SECTION 8(f)

Section 8(f) shifts part of the liability for permanent partial and permanent total disability, and death benefits, from employer to the Special Fund when the disability or death is not due solely to the injury which is the subject of the claim. In construing this provision, the courts have emphasized the proposition that Section 8(f) was enacted to avoid discrimination against handicapped workers. As stated by the D.C. Circuit, and the Ninth Circuit,

> . . . [T]he Act makes the employer liable for compensation. Hence, the employer risks increased liability when he hires or retains a partially disabled worker. By virtue of the contribution of the previous partial disability, such a worker injured on the job may suffer a resulting disability greater than a healthy worker would have suffered. Were it not for the shifting of this increased compensation liability from the employer to the Special Fund under §8(f), the Act would discourage employers from hiring and retaining disabled workers. . . .

Director, Office of Workers' Compensation Programs v. Campbell Industries, Inc., 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983); *C & P Telephone Co. v. Director, OWCP,* 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977), *rev'g Glover v. C & P Telephone,* 4 BRBS 23 (1976). *See also* H. Rep. No. 92-1441, 92nd Cong., 2.d Sess. 8 (1972), *reprinted in* [1972] U.S. Code Cong. & Admin. News, pp. 4698, 4705-06.

GENERAL RULES

Federal and Board case law has established that Section 8(f) relief is available if three requirements are met: (1) the claimant had a pre-existing permanent partial disability; (2) such pre-existing disability, in combination with the susequent work injury, contributes to a greater degree of permanent disability; and (3) the pre-existing disability was manifest to the employer. *Director, OWCP v. Campbell Industries, Inc., supra; C & P Telephone Co. v. Director, OWCP, supra.* The statutory language provides the first two requirements; the courts have added the third requirement. Section 8(f) does not apply where the disability is temporary. *Jenkins v. Kaiser Aluminum & Chemical Sales, Inc.,* 17 BRBS 183 (1985); *see Nathenas v. Shrimpboat, Inc.,* 13 BRBS 34 (1981) (where disability is temporary, it is error for administrative law judge to make Section 8(f) findings).

Section 8(f)(1) begins with a general proposition limiting employer's liability, which is modified by four following sentences. Each of these four sentences states different rules depending on the type of injury and disability suffered. *See generally Primc v. Todd Shipyards Corp.,* 12 BRBS 190 (1980); *Ashley v. Todd Shipyards Corp.,* 10 BRBS 42 (1978), *aff'd,* 625 F.2d 317, 12 BRBS 518 (9th Cir. 1980).

The general statutory rule, applicable where the second injury is not to a member covered by the Sections 8(c)(1) - (20), is as follows: If an employee becomes permanently totally or partially disabled following an injury, and a pre-existing permanent partial disability contributed to the permanent total disability, employer's compensation disability will be limited to 104 weeks, with the remainder to be paid from a Special Fund created under Section 44 of the Act, 33 U.S.C. §944.

While the statute only states that a permanent total disability must not be due solely to the subsequent injury, it further states that a permanent <u>partial</u> disability must be materially and substantially greater than that which would have resulted from the subsequent injury alone.

In the case of a permanent partial or total disability where the second injury is to a member covered by the schedule, employer is liable for the <u>greater</u> of 104 weeks or the number of weeks due for the subsequent injury. In many cases of scheduled permanent partial disability, Section 8(f) does not apply at all as the award to claimant is less than 104 weeks. *See Strachan Shipping Co. v. Nash,* 757 F.2d 1461, 17 BRBS 29 (CRT)(5th Cir. 1985), *on reconsideration en banc,* 782 F.2d 573, 18 BRBS 45 (CRT)(5th Cir. 1986), *aff'g in relevant part* 15 BRBS 386 (1983); *Byrd v. Toledo Overseas Terminal & Wills Trucking Co.,* 18 BRBS 144 (1986).

The 1984 Amendments altered this rule in regard to Section 8(c)(13) hearing loss cases, overruling *Primc v. Todd Shipyards Corp.,* 12 BRBS 190 (1980), insofar as that case held that Section 8(f) did not apply to a hearing loss award of less than 104 weeks. *See also Newport News Shipbuilding & Dry Dock Co. v. Fishel,* 694 F.2d 327, 15 BRBS 52 (CRT)(4th Cir. 1982), *aff'g* 14 BRBS 520 (1981). Under the 1984 Amendments, in hearing loss cases, employer is liable for the lesser of the number of weeks provided for the subsequent loss or 104 weeks. Thus, where employer can establish a manifest prior hearing loss which combines with further exposure to noise to result in an increased loss, the Special Fund will be liable for some benefits. *See Reggiannini v. General Dynamics Corp.,* 17 BRBS 254 (1985).

In cases other than hearing loss cases, where the award to claimant equals or exceeds 104 weeks and the subsequent injury's contribution is less than 104 weeks, employer is liable for 104 weeks. If the award to claimant equals or exceeds 104 weeks, and the subsequent injury's contribution exceeds 104 weeks, employer is liable for the full contribution of the subsequent injury. *See Davenport v. Apex Decorating Co.,* 18 BRBS 194 (1986). In all cases, the Special Fund pays the remainder of the award.

Claimants have argued that Section 8(f) requires an award of at least 104 weeks when a scheduled disability amounts of less than 104 weeks. This contention has been rejected. *Fishel, supra; Strachan, supra.*

Under the aggravation rule, unless Section 8(f) applies, employer must pay the full award regardless of employer's contribution to the disability. *Fishel, supra; Ashley, supra,* 10 BRBS at 48-49. The schedule award or 104 weeks due under Section 8(f) must be paid in addition to payments for temporary total and temporary partial disability. *Romanowski v. I.T.O. Corp.,* 4 BRBS 59 (1976).

SECTION 8(f)
DIGESTS

GENERAL RULES

Note: Cases involving Section 8(f) in hearing loss cases are classified under Section 8(c)(13).

If claimant's scheduled injury results in permanent total disability, and the permanent total disability is not due solely to this subsequent injury, employer is liable for the greater of 104 weeks or the applicable scheduled period of weeks for the injury, even though no award was made pursuant to Section 8(c)(1)-(20). Higgins v. Hampshire Gardens Apartments, 19 BRBS 77 (1986)(Brown, J., dissenting), aff'd on recon. en banc, 19 BRBS 192 (1987).

The Board held that Section 8(f) does not require that a certain amount of time pass between claimant's first injury and his subsequent injury before an employer is entitled to relief. To conclude, as the administrative law judge did, that a short span of time between a claimant's two injuries precludes the possibility of a Section 8(f) award, would eliminate recovery under the statute for recurrences or significant increases in an existing impairment, which would undermine the purpose of Section 8(f). Lockhart v. General Dynamics Corp., 20 BRBS 219 (1988), aff'd sub nom. Director, OWCP v. General Dynamics Corp., 980 F.2d 74, 26 BRBS 116 (CRT) (1st Cir. 1992).

The Board affirmed the administrative law judge's finding that 12 days was a sufficiently long time for a pre-existing permanent partial disability to emerge, and that claimant's intracranial bleeding preceding the stroke constituted a pre-existing disability for purposes of Section 8(f). No specific amount of time must pass between the pre-existing condition and the work injury. The Board therefore rejected Director's argument that claimant's bleeding and stroke constituted all one condition to which Section 8(f) relief would not be applicable. Ortiz v. Todd Shipyards Corp., 25 BRBS 228 (1991).

The administrative law judge erred by finding that employer was not entitled to Section 8(f) relief for the compensation owed claimant as a result of his 1980 injury, but that Section 8(f) relief was available for the compensation owed claimant for his 1983 injury. The administrative law judge's findings on this issue were based on his erroneous concurrent awards. Accordingly, the award was modified to provide employer with Section 8(f) relief for the entire disability award, as claimant's disability was caused by the aggravation of his 1980 injury by his 1983 injury. Kooley v. Marine Industries

Northwest, 22 BRBS 142 (1989).

The Board holds that Section 8(f)(1) specifically and unequivocally states that employer is liable for 104 weeks of permanent disability, in addition to compensation payments for temporary disability. Thus, employer is not entitled to credit payments for temporary disability against its section 8(f) liability where the period of temporary disability falls between two periods of permanent disability. Shaw v. Todd Pacific Shipyards Corp., 23 BRBS 96 (1989).

The Board holds that 20 C.F.R. §702.145(b) does not exempt employer from paying temporary total disability benefits following the completion of the 104 weeks period of permanent partial disability for the same injury. The Board held that the proper interpretation is that an employer who qualifies for Section 8(f) is to provide permanent disability compensation of "only" 104 weeks and for "none other" periods of permanent disability. "In addition" employer must pay all compensation due for temporary disability whenever it occurs. Sizemore v. Seal and Co., 23 BRBS 101 (1989).

The Board notes that its affirmance of the administrative law judge's finding that claimant's subsequent at-home incident did not sever the connection between claimant's work injury and his current condition does not require that it affirm the administrative law judge's denial of Section 8(f) relief; the at-home incident is not relevant to this inquiry. In this case, the Board determined that Section 8(f) relief is available if claimant's initial work-related injury resulted in a serious lasting problem, i.e., the pre-existing permanent partial disability element, which was aggravated by his continuing work for the same employer, i.e., the contribution element and remanded for consideration of these issues. Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991).

The Board rejected employer's argument that since the administrative law judge found in his initial decision that claimant was entitled to an award under Section 8(c)(21), he should have directed the Special Fund to reimburse employer for all sums it paid in excess of 104 weeks pursuant to the 1981 settlement. While the administrative law judge found that employer was entitled to Section 8(f) relief for claimant's back injury, the payments made under 1981 settlement were for claimant's knee injury alone, and there was no evidence of any pre-existing permanent partial disability which contributed to claimant's knee condition. Thus, the payments had no relevance to employer's entitlement to Section 8(f) relief for claimant's back condition. *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994).

The Board remands the case for the administrative law judge to fully discuss the basis for his finding that employer is not entitled to Section 8(f) relief. The Board restates the elements of Section 8(f) and notes that the administrative law judge's decision fails to comport with the APA. *Goody v. Thames Valley Steel Corp.*, 28 BRBS 167 (1994)(McGranery, J., dissenting).

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The Board reversed the administrative law judge's determination that employer is entitled to Section 8(f) relief after 104 weeks from when claimant was adjudged permanently disabled, even though employer was only liable for benefits for six months of that period. Section 8(f) states that "employer shall provide" compensation for a determined period of time and thereafter is entitled to Section 8(f) relief. The decision is modified to reflect the Special Fund's assumption of liability after employer has actually paid permanent disability benefits for 104 weeks. *Hansen v. Container Stevedoring Co.*, 31 BRBS 155 (1997).

Elements of Section 8(f) Relief

Pre-existing Permanent Partial Disability

A condition alleged to be a pre-existing disability for Section 8(f) purposes must precede the injury on which the compensation claim is based. Where the insurer did not argue that the employee had such a condition, the Board held that the administrative law judge properly denied Section 8(f) relief. Mikell v. Savannah Shipyard Co., 24 BRBS 100, (1990), aff'd on recon. 26 BRBS 32 (1992), aff'd mem. sub nom. Argonaut Ins. Co. v. Mikell, 14 F.3d 58 (11th Cir. 1994).

The Ninth Circuit affirms Board's holding that substantial evidence supported a determination that claimant's first injury was not permanent where he resumed his old job including overtime without restrictions or a decrease in pay and there was no objective medical evidence of permanent disability. Todd Shipyards Corp. v. Director, OWCP [Cortez], 793 F.2d 1012, 19 BRBS 1 (CRT) (9th Cir. 1986).

Where claimant had a history of three injuries to his left arm yet suffered no significant medical problems or work restrictions, the mere existence of these prior injuries does not establish a pre-existing disability for Section 8(f) purposes because the pre-existing condition must produce some serious, lasting physical problem. Mijangos v. Avondale Shipyards, Inc., 19 BRBS 15 (1986), rev'd on other grounds, 948 F.2d 941, 25 BRBS 78 (CRT)(5th Cir. 1991).

The Board reverses administrative law judge's denial of Section 8(f) relief, reasoning that claimant's long-standing lung condition consisting of chronic obstructive lung disease, bronchitis and pneumonia constitutes a pre-existing permanent partial disability. Armand v. American Marine Corp., 21 BRBS 305 (1988).

Illiteracy is not a pre-existing permanent disability for purposes of Section 8(f); unless there is a medically cognizable physical or mental ailment underlying a disability such as this, it is a mere social or economic factor insufficient to trigger relief. Watts v. Marcel S. Garrigues Co., 19 BRBS 40 (1986), aff'd sub nom. State Compensation Ins. Fund v. Director, OWCP, 818 F.2d 1424, 20 BRBS 11 (CRT) (9th Cir. 1987).

Mental impairment qualifies as a permanent partial disability under Section 8(f) if it is shown that the impairment was not simply due to lack of education. An employee's illiteracy which is not the result of mental retardation or a learning disability does not constitute a pre-existing permanent partial disability for purposes of Section 8(f). State Compensation Ins. Fund v. Director, OWCP, 818 F.2d 1424, 20 BRBS 11 (CRT)(9th Cir. 1987), aff'g Watts v. Marcel S. Garrigues Co., 19 BRBS 40 (1986).

The definition of disability as an economic concept set forth in Section 2(10) does not apply to Section 8(f). The Ninth Circuit reversed the Board and affirmed the administrative law judge's finding that on the facts presented where psychological testing had revealed that claimant suffered from "borderline retardation," this mental limitation was sufficient to establish a pre-existing permanent partial disability. Todd Pacific Shipyards Corp. v. Director, OWCP [Mayes], 913 F.2d 1426, 24 BRBS 25 (CRT)(9th Cir. 1990).

The Board vacates the administrative law judge's denial of Section 8(f) relief and remands for reconsideration of whether claimant's low intellectual level constitutes a pre-existing permanent partial disability under the Ninth Circuit's precedent in *Mayes*, 913 F.2d 1426, 24 BRBS 25 (CRT) (9th Cir. 1990). *White v. Peterson Boatbuilding Co.,* 29 BRBS 1 (1995).

The Board held, contrary to the administrative law judge's conclusion, that Section 8(f) does not require a finding of maximum medical improvement before a pre-existing permanent partial disability can be found. The pre-existing condition must produce some serious lasting physical problem, but need not have reached maximum medical improvement. Lockhart v. General Dynamics Corp., 20 BRBS 219 (1988), aff'd sub nom. Director, OWCP v. General Dynamics Corp., 980 F.2d 74, 26 BRBS 116 (CRT) (1st Cir. 1992).

Board reverses administrative law judge's holding that age-related disabilities are not within the scope of Section 8(f). There is no indication that Congress intended to preclude an existing disability due to age or other causes from forming a basis for Section 8(f) relief, based solely on the cause of the disability. The disability need only be a serious, lasting physical condition. Board also rejects administrative law judge's reasoning that employees with age-related disabilities are already protected by the Age Discrimination in Employment Act, 29 U.S.C. §621 et seq. The case is remanded for the administrative law judge to determine if degenerative disc disease is a pre-existing permanent partial disability. Greene v. J.O. Hartman Meats, 21 BRBS 214 (1988).

In remanding for reconsideration of the issue of employer's entitlement to Section 8(f) relief, Board notes that an asymptomatic condition which is aggravated by treatment for the work injury might be a pre-existing permanent partial disability. The pre-existing condition need not result in an economic disability to be a pre-existing permanent partial disability. Dugas v. Durwood Dunn, Inc., 21 BRBS 277 (1988).

The court affirms finding that claimant's hypertension was a pre-existing permanent partial disability. Claimant had the condition "for years," had a job offer postponed because of elevated blood pressure, and had significantly elevated blood pressure at the time of hire with employer. Director, OWCP v. General Dynamics Corp. [Fantucchio], 787 F.2d 723, 18 BRBS 88 (CRT)(1st Cir. 1986).

Board notes that symptoms of fatigue alone do not constitute the type of pre-existing condition which would likely motivate a cautious employer to discharge an employee so as to establish a pre-existing permanent partial disability for Section 8(f) purposes and thus the administrative law judge's failure to discuss evidence on this issue is harmless error. Board affirms finding that administrative law judge erred in relying on the fact that claimant had not lost time from work to conclude that claimant's skin rash was not a pre-existing permanent partial disability, inasmuch as a condition need not be economically disabling to constitute a permanent partial disability under Section 8(f). Board, however, finds this to be harmless error, and affirms administrative law judge's denial of Section 8(f) relief based on a determination that administrative law judge correctly concluded that claimant's rash had not resulted in any serious lasting physical problem. Peterson v. Columbia Marine Lines, 21 BRBS 299 (1988).

Board holds that administrative Law Judge erroneously concluded that physician's diagnosis of a protruding disc was insufficient to establish a permanent partial disability simply because he had not given claimant a physical impairment rating. The Act does not require that claimant receive a physical impairment rating to establish a permanent partial disability for Section 8(f) purposes so long as claimant's pre-existing condition has resulted in a serious lasting physical problem. Administrative law judge also erred in relying on the fact that claimant had been released to return to work following his prior injury to conclude that this injury had not resulted in "permanent partial disability" within the meaning of Section 8(f) as a condition need not be economically disabling to establish a permanent partial disability under Section 8(f). Moreover, a doctor stated protruded disc made claimant susceptible to further injury. Smith v. Gulf Stevedoring Co., 22 BRBS 1 (1988).

Board reverses the administrative law judge's finding that claimant's diabetes and hypertension did not constitute pre-existing permanent partial disabilities because they were "merely" risk factors for developing heart disease, and did not constitute serious, lasting problems, and because claimant was unaware of the conditions. The Board held that the mere fact claimant did not lose any time at work due to these conditions does not preclude a finding of pre-existing permanent partial disability, since these conditions need not be economically disabling. The Board further noted that the record contained medical evidence that claimant's hypertension and diabetes put him at risk for heart disease, which demonstrated that these conditions were longstanding and well documented. Dugan v. Todd Shipyards, Inc., 22 BRBS 42 (1989).

Section 8(f) may encompass persons who are "disabled" but who do not meet the standards of "disability" set forth in other statutory schemes. The Board's function is to interpret a specific statutory scheme, not to gauge the necessity of the scheme in light of other laws addressing employment discrimination, as Congress has not given any indication that federal laws protecting the handicapped in any way override or modify Section 8(f). Accordingly, the Board will continue to apply the C & P Telephone standard in determining whether the pre-existing permanent partial disability element is met in a given case. Preziosi v. Controlled Industries, Inc., 22 BRBS 468 (1989)(Brown, J., dissenting).

Obesity, by itself, cannot constitute a pre-existing disability. A pre-existing disability must be a medically cognizable physical ailment rather than an unhealthy habit or lifestyle. Physically disabling symptoms attributable to obesity may thus be sufficient to establish a pre-existing permanent partial disability. The Board remands for the administrative law judge to consider the evidence in light of these propositions. Wilson v. Todd Shipyards Corp., 23 BRBS 24 (1989).

Where pre-employment audiogram revealed a hearing loss too minimal to be quantified under the AMA Guides, the Board held it insufficient to establish a pre-existing permanent partial disability under Section 8(f). The Board, however, remanded for the administrative law judge to determine whether other audiograms included in the record could establish a pre-existing permanent partial disability. Fucci v. General Dynamics Corp., 23 BRBS 161 (1990)(Brown J., dissenting).

The Board affirms administrative law judge's finding that claimant's history of gastrointestinal problems is insufficient to constitute a pre-existing permanent partial disability. Although claimant had several GI series tests and complained of pain over the course of 16 years, there was no evidence of any impairment; after each occasion of abdominal pain, claimant returned to work with no significant problems; and there was no pre-injury diagnosis indicating that claimant suffered from a permanent condition. Devine v. Atlantic Container Lines, G.I.E., 23 BRBS 279 (1990).

The Board holds that an asymptomatic pre-existing condition which pre-disposes a claimant to injury and which would cause a doctor to impose restrictions is a pre-existing permanent partial disability under Section 8(f) because it is a serious lasting condition that would have caused a cautious employer to consider terminating him. Currie v. Cooper Stevedoring Co. Inc., 23 BRBS 420 (1990).

A prior work-related injury may constitute a pre-existing permanent partial disability for purposes of Section 8(f) relief. Emery v. Bath Iron Works Corp., 24 BRBS 238 (1991), vacated mem. sub nom. Director, OWCP v. Bath Iron Works Corp., 953 F.2d 633 (1st Cir. 1991).

The First Circuit agreed with the Board's reversal of Section 8(f) relief. The fact that claimant previously sustained back injuries does not, standing alone, establish that he had a pre-existing permanent partial disability. In this case, claimant resumed regular physical labor after recovering from each of his previous back injuries. Furthermore, employer must show that, but for the pre-existing injury, claimant would not have been rendered totally disabled by the work-related injury. Employer not only failed to show that claimant had a pre-existing injury, it did not show that the pre-existing injury, combined with the final work-related injury, would, or did, create a greater degree of disability. CNA Insurance Co. v. Legrow, 935 F.2d 430, 24 BRBS 202 (CRT)(1st Cir. 1991).

Citing the "cautious employer" test, the Ninth Circuit reversed the Board's denial of Section 8(f) relief and agreed with the administrative law judge that claimant had a preexisting permanent partial disability where there was substantial evidence that claimant failed to completely recover from his back injuries and continued to have back problems for seven years after returning to work. The decision distinguishes Legrow, 935 F.2d 430, 24 BRBS 202 (CRT)(1st Cir. 1991). Lockheed Shipbuilding v. Director, OWCP, 951 F.2d 1143, 25 BRBS 85 (CRT)(9th Cir. 1991).

The Board affirmed the administrative law judge's finding that 12 days was a sufficiently long time for a pre-existing permanent partial disability to emerge, and that claimant's intracranial bleeding preceding the stroke constituted a pre-existing disability for purposes of Section 8(f). No specific amount of time must pass between the pre-existing condition and the work injury. The Board therefore rejected Director's argument that claimant's bleeding and stroke constituted all one condition to which Section 8(f) relief would not be applicable. Ortiz v. Todd Shipyards Corp., 25 BRBS 228 (1991).

The Board affirms finding that employer established a pre-existing permanent partial disability. One of claimant's treating physicians opined that claimant was susceptible to prolonged disability due to his back condition. This opinion constitutes substantial evidence from which the administrative law judge could rationally find that claimant had a serious and lasting permanent partial disability. *Thompson v. Northwest Enviro Services, Inc.*, 26 BRBS 53 (1992).

The Board remands the case for reconsideration of whether claimant's pre-existing back injury constitutes an existing permanent partial disability as he did not consider evidence suggesting that the injury was more serious than the administrative law judge found. *White v. Peterson Boatbuilding Co.*, 29 BRBS 1 (1995).

The Second Circuit deferred to the Director's reliance on *C & P Telephone Co.*, 564 F.2d 503, 6 BRBS 399(CRT) (D.C. Cir. 1977), which defined the term "disability" as used in Section 8(f) as meaning either economic disability, or a condition described in the schedule in Section 8(c), or a physical disability that would motivate a cautious employer to discriminate against a handicapped employee for fear of increased compensation liability. The court, however, declined to defer to the Director's specific application of this standard and remanded the case for the administrative law judge to determine whether claimant's pre-existing asymptomatic back condition constituted a serious physical condition such that a cautious employer would have been motivated to discharged or decline to hire the claimant because of an increased risk compensation liability. The court noted that the administrative law judge is not bound by the Director's view that an asymptomatic condition cannot satisfy this test. *Director, OWCP v. General Dynamics Corp. [Bergeron]*, 982 F.2d 790, 26 BRBS 139(CRT) (2nd Cir. 1992).

Doctor's opinion that claimant had a serious asbestos-related lung disease which was evidenced on x-rays for years prior to his retirement constitutes substantial evidence that claimant had a pre-existing permanent condition which would have motivated a "cautious employer" to discriminate against him because of a greatly increased risk of compensation liability. Medical records need not indicate the precise nature or severity of a pre-existing condition in order to satisfy this requirement of Section 8(f), so long as there is sufficient information to establish the existence of a serious lasting physical problem prior to the subsequent injury. *Shrout v. General Dynamics Corp.*, 27 BRBS 160 (1993)(Brown, J., dissenting).

Because the existing medical records fail to establish that the injuries cited by employer resulted in a "serious lasting physical condition" *etc.*, the administrative law judge rationally determined that employer failed to establish the pre-existing permanent partial disability element of Section 8(f) entitlement. The records reveal only minor injuries with no lingering effects. *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995).

The Board affirmed the administrative law judge’s conclusion that employer failed to establish that claimant suffered from a manifest pre-existing permanent partial disability. The evidence showed that claimant’s pleural thickening prior to his December 1986 work-related injury was minimal, caused by fat, and, after claimant lost 30 to 40 pounds, had disappeared. With regard to claimant’s chronic bronchitis, the administrative law judge found that claimant never missed work because of it, and determined that there was no evidence prior to December 1986, which included either a diagnosis of a chronic condition or a permanent, serious lasting pulmonary condition. *Goody v. Thames Valley Steel Corp.*, 31 BRBS 29 (1997), *aff’d mem. sub nom. Thames Valley Steel Corp. v. Director, OWCP,* 131 F.3d 132 (2d Cir. 1997).

The Board affirmed the administrative law judge's determination that claimant had a pre-existing permanent partial disability as the evidence employer submitted on reconsideration cured the deficiencies the administrative law judge found in the original evidence provided additional support for employer's contention that claimant's pre-existing back problems were "serious and lasting." *Wiggins v. Newport News Shipbuilding & Dry Dock Co.*, 31 BRBS 142 (1997).

In *dicta*, the First Circuit states that claimant's existing obstructive pulmonary disease due to smoking and obesity constitutes a pre-existing permanent partial disability within the meaning of Section 8(f) under the "cautious employer" test. *Director, OWCP v. Bath Iron Works Corp. [Johnson]*, 129 F.3d 45, 31 BRBS 155(CRT) (1st Cir. 1997).

In determining whether claimant had a pre-existing permanent partial disability for purposes of Section 8(f), the Sixth Circuit adopts the cautious employer test, over the Director's objection, under which a claimant has a permanent partial disability when the claimant had "such a serious physical disability in fact that a cautious employer . . . would [be] motivated to discharge the handicapped employee because of a greatly increased risk of employment-related accident and compensation liability." The case is remanded for the administrative law judge to apply this test. *Morehead Marine Services, Inc. v. Washnock,* 135 F.3d 366, 32 BRBS 8 (CRT) (6th Cir. 1998).

The Board affirms the administrative law judge's denial of Section 8(f) relief as he rationally determined that employer did not establish a manifest pre-existing disability. Specifically, although the records submitted by employer in support of its application for Section 8(f) relief indicate that claimant had some pre-existing emotional problems, the administrative law judge rationally found that they do not establish the existence of a serious, lasting emotional problem pre-dating the work injury. *Callnan v. Morale, Welfare & Recreation, Dept. of the Navy*, 32 BRBS 246 (1998).

The Board affirmed the administrative law judge's denial of Section 8(f) relief as employer failed to establish a pre-existing permanent partial disability due to either claimant's obesity or his back condition. Obesity alone is insufficient to establish a pre-existing disability, and the administrative law judge rationally credited evidence that claimant's prior back injuries were only temporarily disabling. *Hundley v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 254 (1998).

The Fourth Circuit affirmed the administrative law judge's finding that employer did not establish a pre-existing permanent partial disability. The administrative law judge rationally rejected the medical opinions of Drs. Reid as lacking supporting data or medical analysis, and claimant returned to work for several years with no permanent work restrictions after the prior injuries. *Newport News Shipbuilding & Dry Dock Co. v. Cherry*, 326 F.3d 449, 37 BRBS 6(CRT)(4th Cir. 2003).

Contribution and Aggravation

The Eleventh Circuit affirmed the Board's decision upholding the administrative law judge's denial of Section 8(f) relief, holding that merely because employer was the responsible employer who last exposed claimant to injurious stimuli under the Cardillo rule, it is not entitled to Section 8(f) relief. The court stated that the Cardillo rule is a rule for allocation of responsibility among insurers for a particular injury and is not relevant to Section 8(f). The employer failed to show an actual aggravation - i.e., no second injury under the usual Section 8(f) analysis. Jacksonville Shipyards, Inc. v. Director, OWCP, 851 F.2d 1314, 21 BRBS 150 (CRT)(11th Cir. 1988), aff'g Stokes v. Jacksonville Shipyards, Inc., 18 BRBS 237 (1986).

Where an employee's increased disability is due to a non-work-related condition, employer has failed to establish that a second, work-related injury contributed to the employee's permanent total disability, and employer is accordingly not entitled to Section 8(f) relief. The court, in a footnote, rejected the argument that under the "last-employer" rule set forth in Cardillo, in an occupational-disease case, a "second injury" is presumed to have occurred with each subsequent exposure to noxious elements. Bechtel Associates, P.C. v. Sweeney, 834 F.2d 1029, 20 BRBS 49 (CRT)(D.C. Cir. 1987).

In a hearing loss case, the Board rejects the contention that exposure sufficient to trigger the "last injurious exposure" rule of Cardillo automatically constitutes a second injury for Section 8(f) purposes. Employer must carry its burden of showing that a second injury occurred before it may be entitled to Section 8(f) relief. Ronne v. Jones Oregon Stevedoring Co., 22 BRBS 344 (1989) aff'd in part and rev'd in part sub nom. Port of Portland v. Director, OWCP, 932 F.2d 836, 24 BRBS 137 (CRT)(9th Cir. 1991).

The Board reversed the administrative law judge's award of Section 8(f) relief where the only relevant medical opinion was insufficient to establish that claimant's disability was caused in part by his pre-existing conditions. Jordan v. Bethlehem Steel Corp., 19 BRBS 82 (1986).

Section 8(f) is not applicable when claimant's disability results from the progression of, or is the direct result and natural consequence of, the pre-existing disability. The Board remands for the administrative law judge to consider whether the pre-existing condition was aggravated by the work injury, which will satisfy the contribution element. Vlasic v. American President Lines, 20 BRBS 188 (1987).

The contribution element is met in this case as uncontradicted evidence establishes that claimant's on-the-job exposure to asbestos increased the severity of claimant's asbestosis. Armand v. American Marine Corp., 21 BRBS 305 (1988).

The Board held that employer could not satisfy the contribution element, that the pre-existing disability, in combination with his subsequent work injuries, contributed to a materially and substantially greater degree of disability, by showing that the claimant suffered an increased "economic disability," where the administrative law judge found that the claimant's physical condition did not change between his first and later injuries. Readel v. Foss Launch and Tug, 20 BRBS 229 (1988).

In remanding for consideration of the contribution element, the Board notes that employer bears the burden of proving that claimant's disability was in part caused by the pre-existing condition, and that a work-related aggravation of a pre-existing condition will suffice as contribution to the total disability. Lockhart v. General Dynamics Corp., 20 BRBS 219 (1988), aff'd sub nom. Director, OWCP v. General Dynamics Corp., 980 F.2d 74, 26 BRBS 116 (CRT) (1st Cir. 1992).

In remanding for consideration of the contribution element, the Board instructed the administrative law judge to consider whether a doctor's inability to complete back operations claimant needed due to the pre-existing condition satisfied this element. Aggravation of a pre-existing condition can satisfy the "contribution" element of Section 8(f). Dugas v. Durwood Dunn, Inc., 21 BRBS 277 (1988).

The Board holds that where a claim is made pursuant to Section 8(c)(23) for lung cancer, employer can not rely on pre-existing hearing loss, lower back difficulties, anemia and arthritis to obtain Section 8(f) relief. These pre-existing disabilities have no role towards establishing claimant's entitlement to an award for lung cancer under Section 8(c)(23), where compensation is awarded solely on the degree of impairment, and thus there is no
contribution to the employee's lung disability. The Board similarly holds with regard to Section 8(f) and a Section 9 death benefits claim, that evidence of the same pre-existing conditions cannot establish Section 8(f) relief, since there is no evidence that these impairments contributed to the employee's death. The evidence of record established that decedent's death was due to respiratory failure from lung cancer and pre-existing chronic obstructive pulmonary disease. Accordingly, only decedent's chronic obstructive pulmonary disease can satisfy the contribution element for Section 8(f) relief. Adams v. Newport News Shipbuilding & Dry Dock Co., 22 BRBS 78 (1989).

In a case where claimant is compensated under Section 8(c)(23) for asbestosis, the First Circuit recognizes that only a pre-existing non-asbestosis related pulmonary disability can form the basis for Section 8(f) relief. *Director, OWCP v. Bath Iron Works Corp. [Johnson]*, 129 F.3d 45, 31 BRBS 155(CRT) (1st Cir. 1997).

Under *Adams*, 22 BRBS 78, pre-existing hearing loss and a prior finger injury cannot contribute to claimant's award under Section 8(c)(23) for asbestosis and cannot be the basis for Section 8(f) relief. *Fineman v. Newport News Shipbuilding & Dry Dock Co.,* 27 BRBS 104 (1993).

The Board permits the Director to raise the contribution issue for the first time on appeal due the fact that *Adams*, 22 BRBS 78, constitutes intervening case law. In this case, the Board holds that decedent's kidney disease cannot contribute to decedent's 100 respiratory impairment which is compensated under Section 8(c)(23). The Board remands for consideration of whether decedent's coronary artery disease "materially and substantially" contributed to the compensable disability. The Board also remands for consideration of whether the kidney disease and/or coronary artery disease contributed to decedent's death. *Stone v. Newport News Shipbuilding & Dry Dock Co.*, 29 BRBS 44 (1995).

The Board reversed the administrative law judge's determination that employer is entitled to Section 8(f) relief. Claimant's leg amputations cannot support a finding of contribution in this Section 8(c)(23) case as they were not a pre-existing disability which contributed to claimant's compensable impairment due to asbestosis. *Beckner v. Newport News Shipbuilding & Dry Dock Co.*, 34 BRBS 181 (2000).

The Board held that the contribution element was established as a matter of law, based on medical evidence which indicated that the risk factors of hypertension and diabetes contributed to or caused claimant's arteriosclerotic heart disease, which contributed to claimant's permanent total disability. The Board noted that the evidence in this case was substantially similar to that in Atlantic & Gulf Stevedores, 542 F.2d 602, 4 BRBS 79 (3d Cir. 1976), where the court held the contribution element was satisfied by evidence that pre-existing disease increased the risk of heart disease and that heart disease contributed to claimant's heart attack. Dugan v. Todd Shipyards, Inc., 22 BRBS 42 (1989).

The Board remands for administrative law judge to consider whether doctor's testimony indicating that a person with resolution of a prolapsed disc is more likely to have recurrence of an injury to a disc at that level, that claimant may have reherniated his disc in the later accident, and that claimant's prior history of disc disease was a factor in the decision to perform fusion surgery following claimant's later injury, is sufficient to satisfy the contribution requirement of Section 8(f). Smith v. Gulf Stevedoring Co., 22 BRBS 1 (1988).

The Ninth Circuit affirmed the Board's holding that claimant's pre-existing heart condition and right shoulder bursitis were unrelated to the work-related back injury, and that the evidence failed to show that they combined with it to result in a greater degree of permanent disability. The court held that even if it credited testimony from a vocational counselor that claimant's pre-existing conditions, combined with the back injury, resulted in a greater disability, this was insufficient to establish that the back injury by itself did not result in his permanent total disability. FMC Corp. v. Director, OWCP, 886 F.2d 1185, 23 BRBS 1 (CRT) (9th Cir. 1989).

The First Circuit agreed with the Board's reversal of Section 8(f) relief where claimant resumed regular physical labor after recovering from each of his previous back injuries and employer did not show that but for the pre-existing injury, claimant would not have been rendered totally disabled by the work-related injury alone. CNA Insurance Co. v.

Legrow, 935 F.2d 430, 24 BRBS 202 (CRT)(1st Cir. 1991).

The Fifth Circuit holds that employer is not entitled to Section 8(f) relief since it did not introduce any medical evidence showing that claimant's pre-existing disability due to 2 developmental diseases of the spine contributed to his current permanent total disability of the back. Court rejects application of a "common sense test," which presumes that when a claimant who had a history of back problems prior to his employment suffers a work-related injury to his back, the current disability is not due solely to the employment injury. *Two "R" Drilling Co., Inc. v. Director, OWCP,* 894 F.2d 748, 23 BRBS 34 (CRT)(5th Cir. 1990).

The Board reversed the administrative law judge's award of Section 8(f) relief as there was no evidence, medical or otherwise, stating that claimant's current disability is contributed to by his pre-existing permanent partial disability. *Sproull v. Stevedoring Services of America*, 25 BRBS 100 (1991)(Brown, J., dissenting on other grounds), *aff'd and modified on recon. on other grounds en banc*, 28 BRBS 271 (1994), *rev'd in pert. part sub nom. Sproull v. Director, OWCP,* 85 F.3d 895, 900, 30 BRBS 49, 52 (CRT) (9th Cir. 1996), *cert. denied*, ___U.S. __, 117 S.Ct. 1333 (1997).

The Ninth Circuit reversed the Board's denial of Section 8(f) relief. Holding that nothing in the Act requires employers to submit medical opinions to establish the contribution requirement, the Ninth Circuit concluded that employer was entitled to establish the contribution requirement under Section 8(f) by medical or *other* evidence. Thus, the court held that the Board erred in reversing the administrative law judge's finding that claimant's prior left hand injury contributed to his current disability due to his left shoulder injury, based on claimant's testimony as to the effects of the injuries on his ability to work. *Sproull v. Director, OWCP*, 86 F.3d 895, 900, 30 BRBS 49, 52(CRT)(9th Cir. 1996), *rev'g in pert. part Sproull v. Stevedoring Services of America,* 25 BRBS 100 (1991), *aff'd in part and modified in part on other grounds on recon.*, 28 BRBS 272 (1994)(*en banc*), *cert. denied*, ____U.S. ___, 117 S.Ct. 1333 (1997).

The Board rejected the Director's argument that claimant's intracranial bleeding and stroke constituted all one condition to which Section 8(f) relief would not be applicable. The Board further rejected the Director's contention that the D.C. Circuit's decision in *Cooper,* 607 F.2d 1385, 10 BRBS 1058 (D.C. Cir. 1979), is analogous, because in the instant case the conditions of claimant's employment, as opposed to merely going to work, aggravated claimant's condition to the point of a stroke. *Ortiz v. Todd Shipyards Corp.,* 25 BRBS 228 (1991).

The Board reverses the award of Section 8(f) relief, as there is no evidence establishing that claimant's pre-existing hand condition contributes in any way to any resulting impairment due to the work-related back injury. *McDougall v. E.P. Paup Co.*, 21 BRBS 204 (1988), *aff'd in pert. part and modified on other grounds sub nom. E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41 (CRT)(9th Cir. 1993).

The Ninth Circuit affirmed the Board's denial of Section 8(f) relief, noting that the medical reports relied upon by employer were insufficient to establish that claimant's injury alone did not cause claimant's permanent total disability. Because there was no evidence of record pertaining to the contribution element other than stipulations to which the Director did not agree, the court affirmed the Board's denial of Section 8(f) relief. *E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41 (CRT)(9th Cir. 1993), *aff'g in pert. part and modifying on other grounds McDougall v. E.P. Paup Co.*, 21 BRBS 204 (1988).

The Board rejects the Director's contention that the contribution element is satisfied only upon a showing that claimant's disability following the employment-related injury would be of a lesser degree "but for" the pre-existing condition, and especially that employer must show that claimant's economic disability is greater due to the pre-existing condition than it would be because of the work injury alone. The Board holds that the contribution element may be satisfied based on medical or other evidence which established that claimant's disability is due to a combination of the pre-existing condition and the subsequent work injury. *Luccitelli v. General Dynamics Corp.*, 25 BRBS 30 (1991), *rev'd sub nom. Director, OWCP v. Luccitelli,* 964 F.2d 1303, 26 BRBS 1 (CRT)(2d Cir. 1992).

The Second Circuit reverses *Luccitelli* finding that the Board's analysis was contrary to the plain language of Section 8(f) which provides that in order for an employer to limit its liability, claimant's permanent total disability must not be due solely to the subsequent injury. The court noted that under the Board's analysis, the question of whether the total disability is due solely to the subsequent injury is never reached and employer would be entitled to Section 8(f) relief even though the subsequent injury alone would have rendered claimant totally disabled. The court held that in order for an employer to establish Section 8(f) contribution, it must show by medical or other evidence that a claimant's subsequent injury alone would not have caused the claimant's permanent total disability. *Director, OWCP v. Luccitelli*, 964 F.2d 1303, 26 BRBS 1 (CRT)(2d Cir. 1992), *rev'g Luccitelli v. General Dynamics Corp*, 25 BRBS 30 (1991).

The Second Circuit holds that in order to satisfy the contribution requirement of Section 8(f), employer must establish that the subsequent injury alone would not have caused claimant's total permanent disability under its holding in *Luccitelli*. This requirement is not satisfied merely by showing that the pre-existing condition made the disability worse than it would have been with only the subsequent injury. *Director, OWCP v. General Dynamics Corp. [Bergeron]*, 982 F.2d 790, 26 BRBS 139 (CRT) (2d Cir. 1992).

The Board affirms finding that contribution element is satisfied based on the affidavit of a doctor, who stated that, but for the prior related injuries, claimant's current disability due to pain would not be as great and/or would not have continued for as prolonged a period of time. Although the administrative law judge did not specifically address whether claimant's prior injuries "materially and substantially" contributed to a greater degree of disability than that resulting from the work injury alone, Dr. Crowley's opinion supports his finding that employer established the contribution element necessary for Section 8(f) relief. *Thompson v. Northwest Enviro Services, Inc.*, 26 BRBS 53 (1992).

Doctor's opinion that if claimant were able to undergo ameliorative back surgery which is precluded by his pre-existing cardiac condition his condition would improve such that he would no longer be permanently totally disabled, is a reasoned medical opinion sufficient to support a finding of Section 8(f) contribution.
Administrative law judge erred in requiring employer to prove that claimant would have undergone ameliorative back surgery if it were not medically contraindicated by claimant's pre-existing cardiac condition in order to establish Section 8(f) contribution. The relevant inquiry is not whether claimant would have undergone the surgery but for the fact that it was contraindicated by his pre-existing cardiac condition, but rather whether the fact that the surgery was contraindicated resulted in claimant being permanently totally disabled rather than retaining some residual wage-earning capacity. Moreover, administrative law judge erred in requiring vocational evidence to prove that claimant would be permanently partially disabled if he underwent surgery. *Pino v. International Terminal Operating Co., Inc.*, 26 BRBS 81 (1992).

The Board holds that the award of Section 8(f) relief based on a pre-existing Nov. 1984 audiogram is not consistent with his determination that claimant was not exposed to injurious noise after Oct. 1984. In the absence of evidence that claimant's condition was aggravated by continued noise exposure after 1984, claimant has suffered only one injury and Section 8(f) is inapplicable. As the record contains a 1978 audiogram, the Board modifies the award of Section 8(f) relief to reflect the Special Fund's liability for the loss shown on this report. *Skelton v. Bath Iron Works Corp.*, 27 BRBS 28 (1993).

While a work-related aggravation of a prior condition may establish contribution for Section 8(f) purposes, where administrative law judge found that claimant's continued exposure to asbestos at the workplace resulted in further impairment, but failed to analyze or discuss the relevant evidence and to identify the evidentiary basis for his conclusion, the Board remanded for reconsideration of this issue in accordance with the APA, 5 U.S.C. §557(c)(3)(A). *Shrout v. General Dynamics Corp.*, 27 BRBS 160 (1993)(Brown, J., dissenting).

The Second Circuit affirmed the administrative law judge's denial of Section 8(f) relief because employer failed to establish that claimant's work-related injury alone would not have caused his disability. *Sealand Terminals, Inc. v. Gasparic*, 7 F.3d 321, 28 BRBS 7 (CRT) (2d Cir. 1993).

The Board remands the case for reconsideration of the evidence consistent with the standard of *Luccitelli*, 964 F.2d 1303, 26 BRBS 1 (CRT) (2d Cir. 1992) that employer must establish that claimant's work injury alone did not cause his permanent total disability. *Esposito v. Bay Container Repair Co.*, 30 BRBS 67 (1996).

The Board affirms the administrative law judge's finding that where claimant had a pre-existing knee condition which was manifest to employer, but there was no record evidence to establish that the knee condition contributed in any way to claimant's current degree of permanent disability, employer did not meet the Section 8(f) contribution requirement; Dr. Gary's opinion that the combination of claimant's knee and back injuries resulted in materially and substantially greater whole body disability is insufficient to establish this prong, as this kind of "common sense" test was rejected in *Two "R" Drilling Co.*, 894 F.2d 748, 23 BRBS 34 (CRT)(5th Cir. 1990). *Abbott v. Louisiana Ins. Guaranty Ass'n*, 27 BRBS 192 (1993), *aff'd*, 40 F.3d 122, 29 BRBS 22 (CRT) (5th Cir. 1994).

The Fourth Circuit held that to satisfy the contribution element of Section 8(f) in a case where claimant is permanently partially disabled, employer must show by medical evidence or otherwise that the ultimate permanent partial disability materially and substantially exceeds the disability as it would have resulted from the work-related injury alone. The court held that a showing of this kind requires quantification of the level of impairment that would ensue from the work-related injury alone so that an adjudicative body has a basis on which to determine whether the ultimate permanent partial disability is materially and substantially greater. The court rejected the Director's contention that a greater loss in wage-earning capacity must be shown and employer's contention that a mere increase in whole body impairment is sufficient. The court therefore reversed the administrative law judge's grant of Section 8(f) relief, and remanded for further findings. *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum],* 8 F.3d 175, 27 BRBS 116 (CRT)(4th Cir. 1993), *aff'd on other grounds*, ___ U.S. ___, 115 S.Ct. 1278 (1995).

To satisfy the contribution element, employer must show that a claimant's subsequent injury alone would not have caused the permanent total disability. This standard is not met merely by demonstrating that the pre-existing injury compounded the employment related injury; rather employer must show that "but for" the pre-existing injury, claimant would be employable. The D.C. Circuit held that the Board exceeded its scope of review in vacating the denial of Section 8(f) relief inasmuch as the administrative law judge's finding that claimant's work-related injury rendered him totally disabled is supported by substantial evidence. The administrative law judge had a sound evidentiary basis for find that employer failed to prove that claimant's pre-existing alcoholism robbed him of the necessary motivation to overcome the severity of the work injury through vocational rehabilitation. *Director, OWCP v. Jaffe New York Decorating*, 25 F.3d 1080, 28 BRBS 30 (CRT) (D.C. Cir. 1994).

In order to establish the contribution element for purposes of Section 8(f) relief where the employee is permanently partially disabled, employer must show by *medical evidence or otherwise* that claimant's disability as a result of the pre-existing condition is materially and substantially greater than that which would have resulted from the work injury alone, and that the last injury alone did not cause claimant's permanent partial disability. Consequently, it is insufficient for employer to show that the pre-existing disability rendered the subsequent disability greater. *Quan v. Marine Power & Equipment Co.*, 30 BRBS 124, 126 (1996).

In *Sproull*, 86 F.3d at 900, 30 BRBS at 52(CRT), the Ninth Circuit held that an employer is entitled to establish the contribution element of Section 8(f) by medical or *other* evidence. In the instant case, the "other" evidence relied upon by employer and consequently, the administrative law judge, is economic in nature. However, while the vocational evidence supports the conclusion that claimant's palsy and depressive reaction limit his opportunity for suitable alternate employment, the administrative law judge did not clearly delineate whether the ultimate permanent partial disability is *materially and substantially* greater due to claimant's prior conditions than it would be as

a result of claimant's subsequent work-related shoulder injury. In light of this, the Board remands for reconsideration of the contribution element. *Quan v. Marine Power & Equipment Co.*, 30 BRBS 124, 127 (1996).

The Board rejected employer's argument that there is a "conflict" among the circuits regarding the nature, quality and scope of contribution evidence necessary to support a Section 8(f) award in a case where the claimant is permanently totally disabled. It held that the proper standard, as set forth in the Act, is whether the present disability is "not due solely to" the work injury, whereas the "but for" language cited by some of the circuits (claimant's disability would be less "but for" the pre-existing disability) is simply descriptive of evidence sufficient to satisfy the statutory mandate. Thus, the Board concluded that the two variations pronounced by the courts have the same implications: a claimant's total disability must have been caused by both the work injury and the pre-existing condition. *Dominey v. Arco Oil & Gas Co.*, 30 BRBS 134 (1996).

The Board affirmed the administrative law judge's conclusion that the term "disability" in Section 8(f) may be composed of both "physical" and "economic" elements, as evidence of claimant's total disability may be either medical or "other." Therefore, the Board rejected the Director's argument that the administrative law judge applied an improper legal standard for obtaining Section 8(f) relief. Consequently, the Board affirmed the Section 8(f) award, holding that the opinions of two doctors constitute substantial evidence establishing that claimant's total disability in this case was caused by his three prior back injuries in conjunction with his more recent work-related back injury. *Dominey v. Arco Oil & Gas Co.*, 30 BRBS 134 (1996).

The Fifth Circuit reversed the administrative law judge‘s finding that employer established the contribution element of Section 8(f). Although the evidence that claimant’s permanent partial disability was increased because of a prior toe injury was sufficient to meet the requirement that claimant’s disability was “not due solely” to the subsequent injury, the evidence was not sufficient to meet the requirement that the disability was “materially and substantially greater” as a result of the prior injury. Satisfying this prong of the statutory test requires employer to present evidence of the type and extent of the disability that claimant would suffer if not previously disabled when injured subsequently. *Director, OWCP v. Ingalls Shipbuilding, Inc. [Ladner]*, 125 F.3d 303, 31 BRBS 146(CRT) (5th Cir. 1997).

The Fifth Circuit held that the Board erred in reversing the administrative law judge’s finding that the contribution element was satisfied. The court held that the evidence was sufficient for the administrative law judge to have inferred that claimant’s pre-existing permanent partial disabilities combined with his employment injury to increase what would otherwise have been a partial disability into a total disability. The existence of multiple injuries that combine to increase a claimant’s disability will satisfy the contribution requirement when the pre-existing injuries are necessary to push the claimant "over the hump" from partial to total disability. *Ceres Marine Terminal v. Director, OWCP [Allred],* 118 F.3d 387, 31 BRBS 91(CRT) (5th Cir. 1997).

The Fifth Circuit affirms the denial of Section 8(f) relief as employer did not establish that claimant's ultimate disability was materially and substantially greater due to the pre-existing injury. The evidence is only that claimant's disability is related to both injuries. Moreover, that claimant had a pre-existing disability of 10 percent and a subsequent disability of 15 percent is insufficient as it does not establish that the resulting disability is not due to the second injury alone. *Louis Dreyfus Corp. v. Director, OWCP*, 125 F.3d 884, 31 BRBS 141(CRT) (5th Cir. 1997).

The First Circuit adopts *Harcum* and holds that in a permanent partial disability case, in order to satisfy the contribution element of Section 8(f), an employer is required to show the degree of disability attributable to the work-related injury, so that this amount may be compared to the total percentage of the partial disability for which compensation under the Act is sought, in order to establish that the current permanent partial disability is materially and substantially greater than that which would have resulted from the subsequent injury alone. The First Circuit concluded that the record does not contain evidence of the percentage of claimant's disability attributable to the work-related asbestosis so that it cannot be determined whether the pre-existing disability rendered claimant's compensable disability "materially and substantially greater." The award of Section 8(f) relief is therefore reversed. *Director, OWCP v. Bath Iron Works Corp. [Johnson]*, 129 F.3d 45, 31 BRBS 155(CRT) (1st Cir. 1997).

The Fourth Circuit, rejecting the "but-for" test urged by the Director, reaffirmed its holding in *Harcum I* that to satisfy the contribution element where the employee is permanently partially disabled, employer must show by medical or other evidence that the ultimate permanent partial disability is materially and substantially greater than a disability from the work-related injury alone. The court reiterated that this showing requires quantification of the level of impairment that would ensue from the work-related injury alone. Rejecting the Director's contention that the quantification criterion may be satisfied only with medical evidence, the court held that a vocational rehabilitation specialist's report discussing wage rates available to claimant with and without the pre-existing disability satisfied the quantification criterion, and, thus, established the contribution element of Section 8(f). *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Harcum II]*, 131 F.3d 1079, 31 BRBS 164(CRT) (4th Cir. 1997).

The Board rejects employer's contention that its first decision was in error and that the administrative law judge's decision on remand is inconsistent with the Ninth Circuit's decision in *Sproull*, 86 F.3d 895, 30 BRBS 49(CRT). The Ninth Circuit has not provided specific guidance as to the degree of quantification necessary to meet the "materially and substantially greater" standard under Section 8(f) where claimant is permanently partially disabled following the subsequent injury. Nevertheless, the Board affirms the administrative law judge's conclusion that the evidence did not establish that claimant's pre-existing disability "materially and substantially" affected his post-injury wage-earning capacity, as he found, based upon the "other" evidence relied upon by employer which is economic in nature, that claimant had virtually the same wage-earning capacity with only the work-related shoulder injury that he would have had with only the pre-existing conditions. *Quan v. Marine Power & Equipment*, 31 BRBS 178 (1997), *aff'd sub nom. Marine Power & Equipment v. Dep't of Labor,* 203 F.3d 664, 33 BRBS 204(CRT) (9th Cir. 2000).

The Ninth Circuit affirmed the administrative law judge's denial of Section 8(f) relief as employer did not establish the contribution element (materially and substantially greater) in this permanent partial disability case since the administrative law judge found that claimant's pre-existing palsy did not affect his wage-earning capacity following his work injury based on wage rate comparisons. The court rejected employer's argument that it established the contribution element by establishing that claimant's pre-existing palsy combined with his work injury foreclosed claimant from some types of employment that he otherwise could perform had he suffered only the work injury since claimant had no highly specialized skill, and since employer did not show that there is a limited number of unskilled positions for which claimant is qualified or that any limit on employment opportunities caused by claimant's pre-existing palsy would measurably affect the number of jobs available to him such that he would spend more time unemployed as a result. *Marine Power & Equip. v. Dep't of Labor [Quan]*, 203 F.3d 664, 33 BRBS 204(CRT)(9th Cir. 2000), *aff'g Quan v. Marine Power & Equip.,* 31 BRBS 178 (1997).

The Fourth Circuit held that under *Harcum I*, it is not proper simply to calculate the current disability and subtract the disability that resulted from the pre-existing injury. In reversing the administrative law judge's award of Section 8(f) relief, the court held that the evidence showed that claimant did not suffer from serious hypertensive cardiovascular disease, and moreover, the reports of employer's in-house physician failed to quantify the disability claimant would have suffered from his asbestosis alone absent the alleged hypertensive cardiovascular disease. With regard to claimant's alleged pre-existing lung scarring, the court held that the reports of employer's physician did not establish quantification pursuant to *Harcum I*, as they did not determine what claimant's disability would have been from his asbestosis alone, independent of the lung

scarring. This type of evidence is necessary before it can be determined if claimant's ultimate disability is materially and substantially greater as a result of a pre-existing condition. *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 32 BRBS 48(CRT) (4th Cir. 1998).

The Board affirmed the administrative law judge's finding that employer is not entitled to Section 8(f) relief on the basis of claimant's pre-existing back condition, as employer put forth insufficient evidence to show contribution under *Harcum I*. Citing the Fourth Circuit's decision in *Harcum II*, however, the Board held that the vocational evidence put forth by employer, a transferable skills analysis to discern what types of jobs or percentage of jobs were available to claimant first, with regard to his March 11, 1990, injury, and then upon consideration of claimant's pre-existing mental impairment, if credited, shows the "level of impairment that would ensue from the work-related injury alone," and thereby provides the administrative law judge with a basis to determine if claimant's ultimate permanent partial disability is materially and substantially greater than his disability caused by the work-related injury alone. The case is remanded for consideration of employer's vocational evidence pursuant to the requisite standard. *Farrell v. Norfolk Shipbuilding & Dry Dock Corp.,* 32 BRBS 118, *vacated on other grounds on recon.,* 32 BRBS 282 (1998).

The Fourth Circuit affirms the finding that employer is not entitled to Section 8(f) relief, as decedent's death was due solely to mesothelioma and was not contributed to or hastened by his pre-existing conditions. The administrative law judge applied the proper "hastening" standard, and his conclusion is supported by substantial evidence. *Brown & Root, Inc. v. Sain,* 162 F.3d 813, 32 BRBS 205(CRT) (4th Cir. 1998).

The Ninth Circuit held that although the administrative law judge did not use the exact words of the statute in determining that claimant's pre-existing condition resulted in disability that was materially and substantially greater than that which would have resulted from the subsequent injury alone, his analysis permissibly followed previous judicial framework for making such a finding, and is supported by substantial evidence. Consequently, the Ninth Circuit affirmed the administrative law judge's finding that employer established this element for Section 8(f) relief. *Director, OWCP v. Coos Head Lumber & Plywood Co*., 194 F.3d 1032, 33 BRBS 131(CRT) (9th Cir. 1998).

When benefits are awarded to both a deceased employee prior to his death under Section 8(a) and to his widow under Section 9, employer's entitlement to relief under Section 8(f) must be evaluated independently for each claim. It is sufficient in the death claim that the evidence establishes that the pre-existing condition hastened death (*i.e.,* would not have died when he did but for the pre-existing condition). In this case, the Board holds that the evidence of record is legally insufficient to establish contribution on the death claim, as employer put forth insufficient evidence that mesothelioma alone did not cause the death. The Board's decision casts doubt on the validity of *Patrick*, 15 BRBS 274 (1983), as using an incorrect contribution standard (*i.e.,* combination). *Stilley v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 224 (2000), *aff'd on other grounds,* 243 F.3d 179, 35 BRBS 12(CRT) (4th Cir. 2001).

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With regard to the contribution element in a case involving permanent total disability, the Third Circuit held the employer must show that the work injury would not have disabled the employee by itself. That is, an employer must demonstrate that the employee would have been able to continue working after the work injury if he had not already been suffering from a pre-existing permanent partial disability. In this case, the court held that there was sufficient evidence of record to demonstrate a pre-existing permanent partial disability and that after the work injury the pain was not significantly greater and that this supports the reasonable inference that the work injury was not severe enough to cause total disability on its own. Therefore, the court reversed the Board's decision and reinstated the administrative law judge's award of Section 8(f) relief. *Pennsylvania Tidewater Dock Co. v. Director, OWCP [Lewis]*, 202 F.3d 656, 34 BRBS 55(CRT) (3d Cir. 2000).

The Board affirmed the administrative law judge's denial of Section 8(f) relief on the Section 8(c)(21) claim, as employer failed to show that any of claimant's manifest pre-existing disabilities contributed to claimant's current back disability. Rather, the administrative law judge found, and that finding went unchallenged, that claimant's current back condition is due to the work injury and to claimant's non-manifest pre-existing degenerative disc disease. *Padilla v. San Pedro Boat Works*, 34 BRBS 49 (2000).

The Board reversed the administrative law judge's determination that employer is entitled to Section 8(f) relief, as employer cannot establish that the ultimate permanent partial disability materially and substantially exceeded the disability that resulted from the injury alone. The parties agreed that claimant has a 25% respiratory impairment, and the administrative law judge credited a medical opinion that claimant's asbestosis alone caused this impairment. The administrative law judge's comparison of claimant's whole body impairment to his compensable impairment is in error. *Beckner v. Newport News Shipbuilding & Dry Dock Co.*, 34 BRBS 181 (2000).

In remanding for consideration of the contribution element, the Board states that a work-related aggravation of a pre-existing condition will suffice as contribution to the total disability, whereas Section 8(f) is not applicable where the claimant's disability is the result of a natural progression of the pre-existing disability. The Board remanded for the administrative law judge to determine whether claimant sustained a second work-related injury or aggravation or whether her present condition is the result of a natural progression of her original work-related injury, as he mischaracterized the medical evidence. If, on remand, the administrative law judge finds a second work-related injury or aggravation, he must determine whether employer has shown that claimant's ultimate permanent total disability is not due solely to the subsequent injury. *Sumler v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 97 (2002).

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The Fourth Circuit applied *Carmines,* 138 F.3d 134, 32 BRBS 48(CRT), and held that the opinions of one doctor is insufficient to establish the contribution element, as he subtracted the extent of disability resulting from the pre-existing disability from the extent of the current disability, which is legally insufficient. The opinion of another doctor is insufficient under *Harcum*, 8 F.3d 175, 27 BRBS 116(CRT), as he did not attempt to quantify the level of impairment that would ensue from the work-related injury alone. The administrative law judge rationally rejected the opinion of the third physician, pursuant to *Carmines*, as the doctor did not treat claimant, his test results were not submitted into evidence and his opinion was discrepant with that of another physician. *Newport News Shipbuilding & Dry Dock Co. v. Winn*, 326 F.3d 427, 37 BRBS 29(CRT) (4th Cir. 2003)

In *dicta,* the Fourth Circuit affirmed the administrative law judge's finding that employer did not establish the contribution element. Although the administrative law judge incorrectly concluded that the physician's opinion did not quantify the degree of disability due to the work injury absent pre-existing conditions, the administrative law judge rationally rejected the opinion because it was without medical foundation. *Newport News Shipbuilding & Dry Dock Co. v. Cherry*, 326 F.3d 449, 37 BRBS 6(CRT)(4th Cir. 2003).

The Fourth Circuit affirmed the Board's decision on reconsideration. It held that, pursuant to *Carmines*, 138 F.3d 134, 32 BRBS 48(CRT), employer did not satisfy the contribution element, as it did not provide quantitative evidence, other than the discredited "subtraction" method, of the disability ensuing from the work injury alone so that it could be determined whether claimant's disability was materially and substantially greater as a result of the pre-existing disability. *Newport News Shipbuilding & Dry Dock Co. v. Pounders*, 326 F.3d 455, 37 BRBS 11(CRT) (4th Cir. 2003).

The Fourth Circuit affirmed the denial of Section 8(f) relief based upon employer's failure to establish the contribution element under the standards set forth in *Carmines,* 138 F.3d 134, 32 BRBS 49(CRT)(4th Cir. 1998). Although employer submitted some evidence that is of the type deemed relevant to the quantification inquiry, the administrative law judge rationally found that the evidence was not creditable as the opinion was generalized and lacking in supporting data. The remaining opinions of record failed to quantify the type and extent of disability which claimant would have suffered from the second injury alone, which is necessary so that a comparison may be made between the degrees of disability arising from each injury and the ultimate resulting disability. *Newport News Shipbuilding & Dry Dock Co. v. Ward*, 326 F.3d 434, 37 BRBS 17(CRT) (4th Cir. 2003).

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Manifest to Employer

In this occupational disease case, the Board declined to eliminate the manifest requirement in those cases where the employee's occupational disease is diagnosed after his employment with employer ends, and concludes that, in order to effectuate the purposes of Section 8(f) (prevention of discrimination against disabled workers), the pre-existing disability must be manifest to employer either at the time of hire or during the period of employment with employer. *Harris v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 114 (1989), *rev'd,* 934 F.2d 548, 24 BRBS 190 (CRT)(4th Cir. 1991).

In reversing the Board's decision in *Harris*, the Fourth Circuit held that the manifest requirement is not applicable in post-retirement occupational disease cases. To establish entitlement to Section 8(f) relief in post-retirement occupational disease cases, an employer need only show that a pre-existing disability combined with an existing permanent partial disability, and contributed to the resulting permanent total disability. *Newport News Shipbuilding & Dry Dock Co. v. Harris*, 934 F.2d 548, 24 BRBS 190 (CRT) (4th Cir. 1991), *rev'g* 23 BRBS 114 (1989). *See also Fineman v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 104 (1993).

In this post-retirement occupational disease case which arises in the Third Circuit, the Board discussed the Fourth Circuit's decision in *Harris*, 934 F.2d 548, 24 BRBS 190(CRT) (4th Cir. 1991). The Board reasoned that the manifest element, while not specifically mandated by the statute, is a long-standing judicially accepted element necessary for second injury relief from the Special Fund. Consequently, it held that the element should be retained in post-retirement occupational diseases cases arising outside the Fourth Circuit, and it vacated the administrative law judge's decision which relied on *Harris*. *Ehrentraut v. Sun Ship, Inc.*, 30 BRBS 146 (1996), *vacated sub nom. Director, OWCP v. Sun Ship, Inc.,* 150 F.3d 288, 32 BRBS 132 (CRT)(3d Cir. 1998).

In this decision in which the Board held that the manifest element is to be retained in post-occupational diseases cases arising outside the Fourth Circuit, it declined to narrow the scope of the manifest element so far as to make it insurmountable by requiring the pre-existing disability to be manifest before either the last date of employment or the last date of exposure to injurious stimuli. Therefore, to this extent, it overruled its prior decision in *Dubar v. Bath Iron Works Corp.*, 25 BRBS 5 (1991). In accordance with circuit precedent, the Board held that, for an employer to be entitled to Section 8(f) relief, the pre-existing permanent partial disability must be manifest prior to the work-related second injury. Such a rule makes the dual goals of Section 8(f) (preventing discrimination and protecting employers) attainable. Consequently, the Board remanded the case for the administrative law judge to consider for the first time whether employer satisfied the manifest element. *Ehrentraut v. Sun Ship, Inc.*, 30 BRBS 146 (1996), *vacated sub nom. Director, OWCP v. Sun Ship, Inc.,* 150 F.3d 288, 32 BRBS 132 (CRT)(3d Cir. 1998).

In a post-retirement occupational disease case, the Third Circuit declined to follow the Fourth Circuit's decision in *Harris v. Newport News Shipbuilding & Dry Dock Co.*, 934 F.2d 548, 24 BRBS 190(CRT)(4th Cir. 1991), eliminating the manifest requirement in such cases. Concluding that the better reasoned approach is set forth by the First Circuit in *Bath Iron Works Corp. v. Director, OWCP [Reno]*, 136 F.3d 34, 32 BRBS 19(CRT)(1st Cir. 1998), the court held that, for an employer to be entitled to Section 8(f) relief, the pre-existing permanent partial disability must be manifest prior to the work-related second injury. *Director, OWCP v. Sun Ship, Inc.*, 150 F.3d 288, 32 BRBS 132(CRT) (3d Cir. 1998), *vacating Ehrentraut v. Sun Ship, Inc.*, 30 BRBS 146 (1996).

The First Circuit rejects the decision of the Fourth Circuit in *Harris*, 934 F.2d 548, 24 BRBS 190(CRT) (4th Cir. 1991), that the manifest element does not apply in post-retirement occupational disease cases. The court states that through the manifest element is the anti-discrimination purpose of Section 8(f) effectuated. The court holds that the pre-existing disability must be manifest to the employer during the term of employment in order for employer to be entitled to Section 8(f) relief. *Bath Iron Works Corp. v. Director, OWCP [Reno]*, 136 F.3d 34, 32 BRBS 19(CRT) (1st Cir. 1998).

Relying on the Board's decision in Harris, 23 BRBS 114 (1989), rev'd, 934 F.2d 548, 24 BRBS 190 (CRT)(4th Cir. 1991), the Board held that in a case involving a claimant whose condition become manifest subsequent to retirement, claimant's pre-existing disability must have been manifest prior to retirement to serve as a basis for Section 8(f) relief. Where there was no creditable evidence of the extent of claimant's hearing loss prior to 1984, and claimant left covered employment in 1971, the Board affirmed administrative law judge's findings that employer did not meet its burden of establishing that claimant had a pre-existing disability which was manifest to employer prior to his leaving covered employment. Dubar v. Bath Iron Works Corp., 25 BRBS 5 (1991).

The Board held that employer did not have to show that the permanent nature of the first injury was manifest to it as employer need not know of severity; rather, the manifest requirement of Section 8(f) may be satisfied either by employer's actual knowledge of the pre-existing condition or by medical records from which claimant's condition could be objectively determined and which were in existence prior to the subsequent injury. *Lockhart v. General Dynamics Corp.*, 20 BRBS 219 (1988), *aff'd sub nom. Director, OWCP v. General Dynamics Corp.*, 980 F.2d 74, 26 BRBS 116 (CRT) (1st Cir. 1992).

The First Circuit affirms the finding that claimant's hypertension was a manifest pre-existing permanent partial disability where claimant's medical records indicated he had the condition "for years" and had significantly elevated blood pressure at his pre-employment physical. Director, OWCP v. General Dynamics Corp. [Fantucchio], 787 F.2d 723, 18 BRBS 88 (CRT)(1st Cir. 1986).

The First Circuit affirms the Board, holding that the manifest standard is met if there is "sufficient information regarding the existence of a serious lasting problem which would motivate a cautious employer to consider terminating the employee because of the risk of compensation liability." This standard would not be met if the injury appeared to be merely temporary, and while absolute certainty of permanency need not be established contrary to the Director's contention, the pre-existing injury must be of "substantial duration and consequence." *Director, OWCP v. General Dynamics Corp.*, 980 F.2d 74, 26 BRBS 116 (CRT) (1st Cir. 1992), *aff'g Lockhart v. General Dynamics Corp.*, 20 BRBS 219 (1988).

A pre-existing disability is manifest if it is objectively determinable from medical records. Where employer introduced no medical records from claimant's surgery, a scar on claimant's back, without any relevant pre-existing diagnoses, is insufficient to satisfy the manifest requirement. *Anderson v. C.G. Willis, Inc.*, 19 BRBS 169 (1987), *aff'd sub nom. C.G. Willis, Inc. v. Director, OWCP*, 31 F.3d 1112, 28 BRBS 84 (CRT) (11th Cir. 1994).

The Eleventh Circuit affirms the Board, holding that a scar on claimant's back, standing alone, does not satisfy the manifest element. Employer did not introduce any medical reports pre-dating the work injury, and the manifest element is not met merely because a pre-existing condition would have been discoverable. *C.G. Willis, Inc. v. Director, OWCP*, 31 F.3d 1112, 28 BRBS 84 (CRT) (11th Cir. 1994), *aff'g Anderson v. C.G. Willis, Inc.*, 19 BRBS 169 (1987).

A pre-existing disability was held by the Board to be "constructively manifest" where claimant had been hospitalized in 1926 for kidney problems, the hospital had destroyed its records after 25 years, and claimant's work-related exposure to asbestos had occurred between 1942 and 1945. Although employer could not produce the hospital records in this case, circumstantial evidence indicated that relevant medical records must have existed in 1945, and the "manifest" requirement of Section 8(f) was thus deemed satisfied. Stone v. Newport News Shipbuilding & Dry Dock Co., 20 BRBS 1 (1987).

The Board need not address the parties contentions regarding whether the administrative law judge properly found that decedent's kidney problems were constructively manifest, inasmuch as the Fourth Circuit, in whose jurisdiction this case arises, in *Harris*, eliminated the manifest requirement in post-retirement occupational disease cases. Stone v. Newport News Shipbuilding & Dry Dock Co., 29 BRBS 44 (1995).

The Board affirms the administrative law judge's finding that claimant's pre-existing back condition was "constructively manifest" in a case in which the medical records of a retired physician who previously had treated claimant no longer existed. The Board holds that the physician's independent recollection that he treated claimant's severe back injury from 1969 to 1971, as supported by the physician's financial records, supports the administrative law judge's inferences that the physician's medical records were available when employer hired claimant in 1969 and for some time thereafter, and

that those records would have provided sufficient information regarding a serious lasting physical problem to satisfy the manifest requirement. *Esposito v. Bay Container Repair Co.*, 30 BRBS 67 (1996).

Board holds that PMA records referring to a no-time-lost back injury are insufficient to establish that claimant's pre-existing degenerative disc disease was a manifest, pre-existing, permanent partial disability because they do not establish a serious physical condition existed prior to the work injury. Board overrules Rowe, 12 BRBS 427 (1980), to the extent that it is inconsistent. Vlasic v. American President Lines, 20 BRBS 188 (1987).

Board agrees with employer that pulmonary function study performed prior to claimant's last injurious exposure with employer is sufficient to establish a manifest pre-existing permanent partial disability, i.e., a lung impairment, under Section 8(f). Because this pulmonary function study in conjunction with testimony of the physician could support an award of Section 8(f) relief, Board remands for reconsideration. Blake v. Bethlehem Steel Corp., 21 BRBS 49 (1988).

The Board vacates administrative law judge's determination that claimant's degenerative disc disease was not "manifest" to employer because of the absence of pre-existing evidence of degeneration at the L3-4 site of claimant's disc rupture. Board finds that pre-existing evidence of disc degeneration both above and below the L3-4 disc, and a prior diagnosis of cervical arthritis, created an issue of fact necessitating remand as to whether claimant's degenerative disc disease was manifest. Evidence of pre-existing condition contained in post-injury deposition will satisfy manifest element if condition was objectively determinable through records extant before the work injury. Greene v. J.O. Hartman Meats, 21 BRBS 214 (1988).

Evidence establishes that employer was actually aware of claimant's history of pulmonary problems, or could have been aware through a pre-existing x-ray with a diagnosis of asbestosis, thus rendering these difficulties "manifest." Armand v. American Marine Corp., 21 BRBS 305 (1988).

The First Circuit refused to extend the manifest requirement of Section 8(f) to encompass disabilities that are "discoverable" by means of further medical testing. White v. Bath Iron Works Corp., 812 F.2d 33, 19 BRBS 70 (CRT) (1st Cir. 1987).

Medical records indicating only an undiagnosed spot on claimant's lungs are insufficient to satisfy the manifest requirement. The Fifth Circuit affirmed the administrative law judge's and Board's findings that claimant's silicosis was not manifest absent a clear diagnosis or indication in medical reports. The court holds that a disease that might have been discovered had proper testing been performed is not manifest. Eymard & Sons Shipyard v. Smith, 862 F.2d 1220, 22 BRBS 11 (CRT) (5th Cir. 1989).

The Sixth Circuit rejected the "manifest" element of Section 8(f) as interpreted by other circuit courts of appeal. The court stated that enforcement of the statute as written--free from an employer knowledge requirement--best accomplishes the stated purpose of Congress in 1972. However, in order to prevent fraud, in determining the existence of the "pre-existing permanent partial disability" element of Section 8(f), inquiry will be made as to whether employer establishes that the pre-existing condition manifested itself to someone prior to that second injury, e.g., employer shows that pre-existing injury or condition has been documented or otherwise shown to exist prior to the second injury. American Ship Building Co. v. Director, OWCP, 865 F.2d 727, 22 BRBS 15 (CRT)(6th Cir. 1989).

X-ray evidence indicating that decedent had an undiagnosed abnormality in the right lung field several years prior to the diagnosis of his lung cancer did not meet the manifest requirement because it did not constitute sufficient, unambiguous and obvious information regarding the existence of a serious, lasting physical problem. Armstrong v. General Dynamics Corp., 22 BRBS 276 (1989).

Noting that medical records of the pre-existing condition need not indicate its severity or precise nature for it to be manifest, the Board held that x-ray evidence of minor degenerative changes of the lumbosacral spine was sufficient to render claimant's pre-existing degenerative back disease constructively manifest to employer. Berkstresser v. Washington Metropolitan Area Transit Authority, 22 BRBS 280 (1989), rev'd sub nom. Director, OWCP v. Berkstresser, 921 F.2d 306, 24 BRBS 69 (CRT) (D.C. Cir. 1990).

The D.C. Circuit reverses the Board's holding that the manifest element was met. Although the manifest condition need not be serious enough to actually impair the employee at the time of hiring or retention and may even be asymptomatic, the fact that claimant had a pre-injury diagnosis of a minimal spinal degeneration that was no worse than normal and was present in most people of his age is not sufficient to raise the risk of employment discrimination and trigger Section 8(f). Director, OWCP v. Berkstresser, 921 F.2d 306, 24 BRBS 69 (CRT)(D.C. Cir. 1990), rev'g in part Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984) and rev'g Berkstresser v. Washington Metropolitan Area Transit Authority, 22 BRBS 280 (1989).

The Ninth Circuit rejected evidence that claimant's present disability was due more to his pre-exiting osteoarthritis than to his back injury, as the osteoarthritis was not manifest to employer prior to the back injury. FMC Corp. v. Director, OWCP, 886 F.2d 1185, 23 BRBS 1 (CRT) (9th Cir. 1989).

Claimant's first two hernias satisfy the manifest element as a matter of law as they occurred at work; employer had actual knowledge of their existence. Marko v. Morris Boney Co., 23 BRBS
353 (1990).

The Board affirms the administrative law judge's finding that pre-existing records indicating claimant received Valium for over 2 years before the work injury for hand tremors, and a doctor's notation that claimant exhibited anxiety shortly before receiving the first prescription, failed to establish that claimant's pre-existing depression was manifest to employer. After the initial recording of anxiety there were no further notations of anxiety or any other psychological illness. *Hayes v. P & M Crane Co.,* 23 BRBS 389 (1990), *rev'd in part on other grounds,* 930 F.2d 424, 24 BRBS 116 (CRT)(5th Cir.), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991).

The Board holds that a kidney x-ray report, which included a secondary diagnosis of moderate degenerative changes in the left hip, constituted substantial evidence to support the administrative law judge's finding that the pre-existing degenerative condition was manifest. The Board also rejects the Director's argument that the x-ray evidence did not meet the manifest requirement because it did not indicate the seriousness of the condition. Currie v. Cooper Stevedoring Co. Inc., 23 BRBS 420 (1990).

The Board reverses administrative law judge's finding that claimant's illiteracy rendered his mental retardation and learning disability, which were not diagnosed until subsequent to the work injury, manifest to employer. Lacey v. Raley's Emergency Road Serv., 23 BRBS 432 (1990), aff'd mem., 946 F.2d 1565 (D.C. Cir. 1991).

A *post-hoc* diagnosis of a pre-existing condition, even if based on pre-existing medical records, is insufficient to satisfy the manifest requirement. Moreover, claimant's cervical problem was not objectively determinable from existing records; they show only that claimant sought treatment for episodes of neck and shoulder pain and do not contain a diagnosis. The Board thus affirms the administrative law judge's denial of Section 8(f) relief. *Caudill v. Sea Tac Alaska Shipbuilding,* 25 BRBS 92 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993).

The Ninth Circuit affirmed the Board's holding that claimant's psychological disorder was not manifest to employer prior to his work-related injury in 1981, based on a 1979 orthopaedic report which contained no diagnosis of any psychological disorder, or any inference that claimant's problems were of a psychological nature. The court ruled that a medical record describing pain without an identification of a psychological or neurological cause does not by itself constitute sufficient unambiguous, objective, and obvious indication of a psychological disability sufficient to render claimant's psychological condition manifest. *Bunge Corp. v. Director, OWCP,* 951 F.2d 1109, 25 BRBS 82 (CRT)(9th Cir. 1991).

The Second Circuit holds that claimant's pre-existing back condition was not manifest prior to claimant's work-related injury, and the fact that claimant's back condition could have been discovered through use of x-rays did not render the condition manifest to employer. The court declined to abandon the manifest requirement of Section 8(f). *Sealand Terminals, Inc. v. Gasparic*, 7 F.3d 321, 28 BRBS 7 (CRT) (2d Cir. 1993).

The Board notes that to the extent that the administrative law judge required employer to have actual knowledge of the reports discussing the pre-existing condition, he erred, as constructive knowledge has long been a sufficient basis for satisfaction of the manifest element. *Lucas v. Louisiana Ins. Guaranty Assoc.*, 28 BRBS 1 (1994).

The Board affirmed the administrative law judge's conclusion that employer failed to establish that claimant suffered from a manifest pre-existing permanent partial disability. The diagnoses of chronic bronchitis and asbestosis in the medical reports given in 1987, 1988 and 1990 respectively, each post-date claimant's December 1986 injury and, thus, are insufficient to render these conditions manifest under Section 8(f). *Goody v. Thames Valley Steel Corp.*, 31 BRBS 29 (1997), *aff'd mem. sub nom. Thames Valley Steel Corp. v. Director, OWCP,* 131 F.3d 132 (2d Cir. 1997).

The Fifth Circuit remands for the administrative law judge to determine whether claimant's degenerative cervical spine disease was manifest to employer prior to the work injury. The court stated that although it has not expressly adopted an objective standard for determining whether the manifest requirement was satisfied (constructive knowledge), it has previously recognized that there may be instances where, although a diagnosis is not expressly stated in the medical records, the records contain sufficient unambiguous, objective, and obvious indication of a disability so that the disability should be considered manifest even though actually unknown to the employer. *Ceres Marine Terminal v. Director, OWCP [Allred],* 118 F.3d 387, 31 BRBS 91(CRT) (5th Cir. 1997).

The court affirmed the administrative law judge's finding that the deceased employee's pre-existing condition of severe cardiovascular atherosclerosis was not manifest to employer prior to the employee's death and therefore employer was not entitled to Section 8(f) relief. Mere presence of certain risk factors, namely, four recorded incidents of high blood pressure over a period of six years, 20 year smoking history of two packs per day, a family history of diabetes, and that the employee was an obese male, is not legally sufficient to establish the manifest requirement. Without a documented diagnosis, there must be sufficient unambiguous, objective, and obvious indication of a disability reflected by the factual information contained in the available records so that the disability should be considered manifest even though actually unknown by the employer. As such was lacking here, the administrative law judge's finding that the deceased employee's condition was not manifest to employer is supported by substantial evidence. *Transbay Container Terminal v. U.S. Dep't of Labor*, 141 F.3d 907, 32 BRBS 35(CRT) (9th Cir. 1998).

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The administrative law judge's finding that claimant's pre-existing back condition was manifest prior to claimant's June 1986 work injury is affirmed, as employer's clinic records reflect that claimant sustained 5 back injuries in 7 years and, in addition, document numerous occasions since October 1981 when claimant's back problems required the use of prescription medication and imposition of work restrictions. *Wiggins v. Newport News Shipbuilding & Dry Dock Co.*, 31 BRBS 142 (1997).

The Board affirms the administrative law judge's denial of Section 8(f) relief as he rationally determined that employer did not establish a manifest pre-existing disability. Specifically, although the records submitted by employer in support of its application for Section 8(f) relief indicate that claimant had some pre-existing emotional problems, the administrative law judge rationally found that they do not establish the existence of a serious, lasting emotional problem pre-dating the work injury. *Callnan v. Morale, Welfare & Recreation, Dept. of the Navy*, 32 BRBS 246 (1998).

The Fifth Circuit holds that a physician's report to a former employer sent one year prior to the subject injury discussing claimant's injuries and degenerative disease and reporting worsening pain and discomfort is sufficient to establish the manifest element. *Director, OWCP v. Vessel Repair, Inc. [Vina]*, 168 F.3d 190, 33 BRBS 65(CRT) (5th Cir. 1999).

The Ninth Circuit held that the administrative law judge, after examination of depositions and other evidence, reasonably inferred from circumstantial evidence that medical records documenting claimant's prior broken back must have been in existence when employer hired the claimant, and thus, affirmed the administrative law judge's finding that employer established the manifest element for Section 8(f) relief. *Director, OWCP v. Coos Head Lumber & Plywood Co*., 194 F.3d 1032, 33 BRBS 131(CRT)(9th Cir. 1998).

The Third Circuit held that the administrative law judge correctly found that substantial evidence supports the conclusion that claimant's pre-existing back condition was manifest to employer. Prior to his work injury, claimant had been diagnosed as having a bulging disc and the start of a "neuropathic process" in his back which caused him great pain. As these results were in claimant's medical files, the court held that they were available to employer and, therefore, were manifest prior to the work injury in 1993. *Pennsylvania Tidewater Dock Co. v. Director, OWCP [Lewis]*, 202 F.3d 656, 34 BRBS 55(CRT) (3d Cir. 2000).

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Procedural Questions Concerning Section 8(f)

Standing

In a footnote, the Board declined to consider a claimant's contentions pertaining to an administrative law judge's Section 8(f) determination, reasoning that claimants possess no cognizable interest in dispositions of requests for Section 8(f) relief. *Coats v. Newport News Shipbuilding & Dry Dock Co.,* 21 BRBS 77 (1988).

In a footnote, the Board states that the Director has standing to appeal the administrative law judge's Section 8(f) findings regardless of whether he participated before the administrative law judge. *McDougall v. E.P. Paup Co.*, 21 BRBS 204 (1988), *aff'd in pert. part and modified on other grounds sub nom. E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41 (CRT)(9th Cir. 1993).

The Fourth Circuit holds that the Director has standing to challenge a Section 8(f) award. *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum]*, 8 F.3d 175, 27 BRBS 116 (CRT)(4th Cir. 1993), *aff'd*, ___ U.S. ___, 115 S.Ct. 1278 (1995).

Timeliness of Employer's Claim for Relief

The correct cite for *Verderane* in 1986 Deskbook is 772 F.2d 775, 778 n.5, 17 BRBS 154, 157 n.5 (CRT)(11th Cir. 1985).

The Section 8(f) waiver rule is procedural with Board; the party asserting that it was waived because it could have been raised earlier has burden of raising issue and proving it, which the Director failed to do here. If Section 8(f) was not applicable to the injury before modification was sought, employer may seek it for the first time as a defense to a Section 22 proceeding. Director, OWCP v. Edward Minte Co., Inc, 803 F.2d 731, 19 BRBS 27 (CRT)(D.C. Cir. 1986), aff'g Dixon v. Edward Minte Co., Inc., 16 BRBS 314 (1984).

The Board holds that the issue of Section 8(f) applicability, although not initially raised before the administrative law judge since only temporary disability benefits were sought, was properly raised on remand, since the extent of claimant's disability was then at issue, and since the Court of Appeals stated that the administrative law judge should consider the applicability of Section 8(f) on remand. The administrative law judge thus abused his discretion in denying employer's motion to reopen the record for submission of evidence bearing on permanency, given the "special circumstances" existing in this case, and given that employer's motion could be construed as a Section 22 petition for modification based on a change in claimant's medical condition. Champion v. S & M Traylor Bros., 19 BRBS 36 (1986).

The Board holds that the administrative law judge erred in finding that employer waived its right to Section 8(f) relief both by failing to raise the issue at the original hearing and by failing to raise it in response to the administrative law judge's show cause order on modification. The party opposing the request for Section 8(f) relief on grounds of waiver must raise the waiver issue and come forward with facts supporting the waiver claim, which no party did here. Moreover, the issue of Section 8(f) need not be raised and litigated until the first hearing wherein permanent disability is at issue. Moore v. Washington Metropolitan Area Transit Authority, 23 BRBS 49 (1989).

The First Circuit holds that, although a claim for relief under Section 8(f) must be made at or before the first hearing or the issue is considered waived, the administrative law judge acted within his discretion in raising the issue on his own initiative under 20 C.F.R. §702.336. Nonetheless, he failed to give the Director the chance to address the issue, and the case is therefore remanded to give the parties the opportunity to fully and fairly litigate the issue. *Cornell University v. Velez*, 856 F.2d 402, 21 BRBS 155 (CRT) (1st Cir. 1988).

Board reverses administrative law judge's finding that employer is entitled to Section 8(f) relief. Request for Section 8(f) relief must be raised and litigated at the first hearing wherein permanent disability is at issue. Employer received notice of deputy commissioner's intent to modify claimant's temporary partial disability benefits to permanent partial status in 1969, and should have raised 8(f) issue at that time. Moreover, where claimant's request for modification was denied, employer's defense of Section 8(f) also fails. Board rejects Director's contention that Section 8(f) can only be raised at modification proceedings if there has been a mistake in a determination of fact or change in condition with regard to an earlier Section 8(f) determination. Allison v. Washington Society for the Blind, 20 BRBS 158 (1988), rev'd, 919 F.2d 763 (D.C. Cir. 1991).

The D.C. Circuit reverses the Board's holding that employer waived its rights to Section 8(f) relief by failing to assert it in 1969, when the deputy commissioner modified claimant's award of compensation for temporary partial to permanent partial disability. Noting that under the pre-1972 version of Section 8(f), only a change in claimant's status to permanent total disability would have allowed Section 8(f) relief, the court ruled that employer did not waive its rights by failing to assert its entitlement in 1969 since the only question presented to the deputy commissioner in 1969 was whether claimant had permanent partial disability. The court upheld the Board's rejection of the Director's contention that Section 8(f) can only be raised in Section 22 modification proceedings if there has been a mistake of fact with regard to a previous 8(f) determination. Washington Society for the Blind v. Allison, 919 F.2d 763 (D.C. Cir. 1991), rev'g 20 BRBS 158 (1988).

Board holds that the "law of the case" doctrine does not preclude an administrative law judge from reopening the previously-decided issue of Section 8(f) relief where the case is before him pursuant to a request for modification, even where Section 8(f) has not been specifically raised as an issue in the modification request, if the administrative law judge finds that a "mistake in fact" is contained in the previous Section 8(f) determination. Board nonetheless remands, since the administrative law judge in this case did not afford the parties an adequate opportunity to present evidence and arguments relevant to Section 8(f) once he notified them that he would address this issue in his decision on modification. Coats v. Newport News Shipbuilding & Dry Dock Co., 21 BRBS 77 (1988).

Inasmuch as the Director concedes that employer is entitled to a hearing on modification regarding its request for Section 8(f) relief, the Board remands the case for further proceedings and does not need to address LIGA's specific arguments regarding the administrative law judge's finding that it could have litigated the Section 8(f) issue earlier. *Lucas v. Louisiana Ins. Guaranty Assoc.*, 28 BRBS 1 (1994).

Only claims for Section 8(f) relief filed after the effective date of the 1984 Amendments are subject to the requirement of Section 8(f)(3) that the claim for 8(f) relief be filed as soon as the permanency of claimant's condition is known or is in dispute, or as soon after death as possible in a death benefits case, and the failure to do so is an affirmative defense which the Director must raise. As the case was referred to OALJ after the effective date of the 1984 Amendments, and the Director did not raise this issue, the administrative law judge erred in denying Section 8(f) relief on this basis. Nevertheless, the Board affirms the denial of Section 8(f) relief as the administrative law judge did not abuse his discretion in finding that employer's failure to notify the Director that Section 8(f) would be at issue precluded consideration of the issue. Scott v. S.E.L. Maduro, Inc., 22 BRBS 259 (1989).

Although employer did not fully comply with the requirements of 20 C.F.R. §702.321(a) in its application for Section 8(f) relief, Director's failure to affirmatively raise and argue this issue below precludes Director from using Section 8(f)(3) as a defense to employer's claim under 20 C.F.R. §702.321(b)(3). Marko v. Morris Boney Co., 23 BRBS 353 (1990).

The Fourth Circuit agrees that Section 8(f)(3) is inapplicable as permanency was not at issue before the district director and because the Director did not raise the affirmative defense. Nevertheless, the court affirms the finding that employer’s claim for Section 8(f) relief was untimely as it was first raised in a motion for reconsideration after the administrative law judge awarded permanent total disability benefits. Employer was obligated to raise the issue at the earliest time it was aware of a claim for permanent disability benefits, which was when claimant raised the issue before the administrative law judge. *Universal Maritime Corp. v. Moore,* 126 F.3d 256, 31 BRBS 119(CRT)(4th Cir. 1997).

The Board held that the administrative law judge acted within his discretion in refusing to address employer's request for Section 8(f) relief. In this case, employer timely raised the issue before the district director; however, it did not raise Section 8(f) as an issue before the administrative law judge until it filed a motion for reconsideration. Because the administrative law judge may refuse to entertain a post-hearing request to address an issue which should have been anticipated before the hearing, the Board affirmed the administrative law judge's decision. *Mowl v. Ingalls Shipbuilding, Inc.*, 32 BRBS 51 (1998).

In this case, where employer withdrew its claim for Section 8(f) relief from consideration following the initial hearing in 1995, and neither alleged nor demonstrated any reason for not having litigated Section 8(f) at that time, the Board reversed administrative law judge and held that employer is not entitled to Section 8(f) relief, because its 1996 application filed on modification was not timely under *Egger v. Willamette Iron & Steel Co.*, 9 BRBS 897 (1979). As *Egger* was decided in 1979, employer was on notice at the 1995 hearing that bifurcation of the liability and Section 8(f) issues was improper, and while the administrative law judge did not specifically inform the parties that postponing Section 8(f) consideration at the initial hearing would result in a waiver, the Board agreed with the Director that he had no duty to do so given that *Egger* had been in existence for 15 years as of the time of the hearing. *Serio v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 106 (1998).

The Board affirms the administrative law judge's finding that employer's failure to raise Section 8(f) at the deputy commissioner level was excused, since employer could not reasonably have anticipated the liability of the Special Fund before the case was referred to OALJ, as claimant previously had denied any prior injuries. The Board further holds that the eight month delay between employer's filing of its LS-18 raising Section 8(f) and the submission of its supporting documentation does not bar employer's claim pursuant to Section 8(f)(3). The Board reasons that if the failure to present a timely application is excused because the liability of the Special Fund could not be anticipated, so too is the failure to present a fully documented application in a timely manner, as long as the Director, the administrator of the Fund, is given proper notice. Under the facts of the instant case, the Board holds that the Director's entitlement to adequate notice and its due process rights were not abridged. Currie v. Cooper Stevedoring Co. Inc., 23 BRBS 420 (1990).

In reviewing the administrative law judge's determination that employer's claim for relief under Section 8(f) was barred under Section 8(f)(3) and 20 C.F.R. §702.321, the Board held that these provisions limit the inquiry of the administrative law judge to one of whether the issue of permanency was in fact before the deputy commissioner, rather than allowing him to also consider whether the issue of permanency should have been raised, as neither the Act nor the regulations can be interpreted to require an employer to monitor a claimant's condition in order to initiate consideration of the issue of permanency and thus preserve its right to seek Section 8(f) relief. Thus, although the administrative law judge found that claimant's condition reached maximum medical improvement prior to the date of the informal conference, the Board held that since the relevant evidence did not establish that the issue of permanency was actually before the deputy commissioner, the administrative law judge erred in finding employer's Section 8(f) request barred under Section 8(f)(3). Brazeau v. Tacoma Boatbuilding Co., 24 BRBS 128 (1990).

The Board affirms the administrative law judge's order granting the Director's motion to dismiss employer's request for Section 8(f) relief pursuant to Section 8(f)(3). Employer was given 60 days in which to submit a fully documented application, but did not file it within this time frame, and there is no creditable evidence that employer was given an additional extension. *Hargrave v. Cajun Tubing Testors, Inc.*, 24 BRBS 248 (1991), *aff'd*, 951 F.2d 72, 25 BRBS 109 (CRT) (5th Cir. 1992).

The Fifth Circuit affirmed the Board's determination that the deputy commissioner was entitled to assert the absolute defense to Section 8(f) liability because employer's application for Section 8(f) relief was not timely filed pursuant to 20 C.F.R. §702.321(b) based on employer's failure to provide adequate documentation within the 60-day period granted after its initial filing of the application, or to file for an extension of time to do so. *Cajun Tubing Testors, Inc. v. Hargrave*, 951 F.2d 72, 25 BRBS 109 (CRT)(5th Cir. 1992), *aff'g* 24 BRBS 248 (1991).

The Ninth Circuit affirms the finding that employer's untimely application to the administrative law judge for Section 8(f) relief serves as an absolute bar to the Special Fund's liability under Section 8(f)(3) since the permanency of claimant's disability was at issue prior to the time that the deputy commissioner referred the case to the administrative law judge for a formal hearing. In this case, claimant's claim form stated that he was seeking permanent benefits and a doctor's report stated that claimant had a permanent partial disability. Employer, therefore, should have raised the issue of its entitlement to Section 8(f) relief before the deputy commissioner. Container Stevedoring Co. v. Director, OWCP, 935 F.2d 1544, 24 BRBS 213 (CRT)(9th Cir. 1991).

The Board affirmed the administrative law judge's finding that employer's post-hearing request for Section 8(f) relief was barred by Section 8(f)(3). Employer was put on notice that the liability of the Special Fund could be at issue while the case was before the deputy commissioner when it became aware that the case involved a claim for death benefits, and, additionally, when a disability claim based on asbestosis was filed at the same time. The Board also held that employer had sufficient information in its possession at the time of the informal conference indicating decedent had pre-existing medical conditions which could have contributed to his death. Moreover, the Board rejected employer's argument that it lacked sufficient information to file a fully documented Section 8(f) application while the case was before the deputy commissioner as Section 702.132(b) distinguishes between requesting Section 8(f) relief, and filing a documented application for such relief. Bailey v. Bath Iron Works Corp., 24 BRBS 229 (1991), aff'd sub nom. Bath Iron Works v. Director, OWCP, 950 F.2d 56, 25 BRBS 55 (CRT)(1st Cir. 1991).

The First Circuit affirmed the Board's affirmance of the administrative law judge's application of the Section 8(f)(3) bar. The court noted that employer had sufficient medical evidence in its possession at the time of the informal conference indicating that decedent's pre-existing lung impairment contributed to his death, thereby enabling employer to reasonably anticipate the liability of the Special Fund. The court further noted that if employer believed that it possessed insufficient evidence to meet the requirements for a fully documented application as described in 20 C.F.R. §702.321, they should have simply requested additional time in which to develop the required evidence. Bath Iron Works Corp. v. Director, OWCP, 950 F.2d 56, 25 BRBS 55 (CRT)(1st Cir. 1991), aff'g Bailey v. Bath Iron Works Corp., 24 BRBS 229 (1991).

The Board affirmed the administrative law judge's finding that employer's claim for Section 8(f) relief was barred. Employer had evidence at the deputy commissioner level that claimant's hearing loss might be permanent and that Section 8(f) might be applicable. Thus the request for Section 8(f) relief -- initially presented post-hearing -- would have been barred under Section 8(f)(3) had the Section 8(f)(3) defense been properly raised by the Director. In this case, the Director did not properly raise Section 8(f)(3), but the Board held that it was within the administrative law judge's adjudicatory powers to nonetheless decline to consider Section 8(f), as it was a "new" issue, and affirmed the administrative law judge's ultimate denial of Section 8(f) relief. Emery v. Bath Iron Works Corp., 24 BRBS 238 (1991), vacated mem. sub nom. Director, OWCP v. Bath Iron Works Corp, 953 F.2d 633 (1st Cir. 1991).

The Board reversed the administrative law judge's denial of employer's Section 22 motion for modification and protective cross-appeal to preserve its right to seek Section 8(f) relief in the future. Employer fully satisfied the filing requirements through its timely and repeated requests for Section 8(f) relief from the outset of this case, including while the case was before the deputy commissioner. The administrative law judge erred in finding that employer cannot raise the issue because it did not raise it in response to claimant's motion for reconsideration and did not appeal the issue to the Board. There is no requirement that employer raise the issue in response to a motion for reconsideration, and there were no adverse findings for employer to appeal to the Board. Lastly, the administrative law judge erred in raising the issue of the waiver of Section 8(f) *sua sponte*, as the party raising the waiver issue bears the burden of coming forward with facts to support the contention, and the Director failed to do so here. Reynolds v. Cooper Stevedoring Co., Inc., 25 BRBS 174 (1991).

The Board reversed the administrative law judge's finding that the Section 8(f)(3) bar applies. Although permanency was at issue, employer did not possess sufficient medical evidence at the time of the informal conference on which it could have requested Section 8(f) relief based on the theory of pre-existing intracranial bleeding, and therefore could not have reasonably anticipated the liability of the Special Fund. The Board noted that medical records covering the 12 day period of claimant's initial injuries
merely indicated that claimant complained of neck, shoulder and severe head pain, and that no "correct" diagnosis indicating that claimant's intracranial bleeding (as opposed to his hypertension) leading to a stroke was aggravated by his continuing to work was made until nearly two years after this period. Ortiz v. Todd Shipyards Corp., 25 BRBS 228 (1991).

In a case in which the Director has properly raised the Section 8(f)(3) absolute defense, the administrative law judge, before proceeding to the merits of the employer's Section 8(f) request, must give *de novo* consideration to whether the employer submitted a sufficiently documented Section 8(f) application to the district director in compliance with Section 8(f)(3) and 20 C.F.R. §702.321. If the administrative law judge finds the Section 8(f)(3) bar does not apply, he then may consider the merits of the Section 8(f) request; if the administrative law judge finds that the bar does apply, he must deny Section 8(f) relief. As the Section 8(f) bar is an affirmative defense, it is the Director's burden to come forward with the necessary evidence to support the claim that the employer failed to comply with Section 8(f)(3), including the allegedly deficient Section 8(f) application. *Tennant v. General Dynamics Corp.*, 26 BRBS 103 (1992).

The Board follows *Tennant*, 26 BRBS 103 (1992) in a case in which the Director appealed an administrative law judge's Decision and Order awarding employer Section 8(f) relief, contending that the Section 8(f) claim should have been found barred by the employer's failure to submit a fully documented application to the deputy commissioner pursuant to 20 C.F.R. §702.321. The Board notes that inasmuch as employer's Section 8(f) application was not included in the record before the administrative law judge, the administrative law judge had an inadequate basis for concluding that the Director was improperly attempting to invoke the Section 8(f)(3) absolute defense on the ground that the application was not sufficiently convincing rather than because it failed to adequately state the grounds for the request as required by the Act. Thus, the Board vacates the award of Section 8(f) relief and remands the case for the administrative law judge to reconsider whether employer's application was sufficient after reopening the record for submission of the application and other relevant evidence. *Fullerton v. General Dynamics Corp.*, 26 BRBS 133 (1992).

The Board rejected employer's assertion that Section 8(f)(3) is not applicable, since employer first requested Section 8(f) relief in April 1986, subsequent to the effective date of the 1984 Amendments, September 28, 1984. The Board affirmed the administrative law judge's application of the absolute bar under Section 8(f)(3), and his consequent denial of Section 8(f) relief, since there was no evidence in the record that the district director ever received employer's Section 8(f) application, notwithstanding employer's assertion that the application was mailed. *Lassiter v. Nacirema Operation Co.,* 27 BRBS 168 (1993).

The regulation at 20 C.F.R. §702.321(c) provides that when a case raising Section 8(f)(3) is transmitted to OALJ, the district director shall attach a copy of the application and his denial of it. Thus, although the district director's correspondence was not admitted into evidence, the administrative law judge may consider the correspondence in determining whether the request for relief is barred. In this case, the administrative law judge's finding that the claim is barred by Section 8(f)(3) is reversed. Claims were filed for injuries occurring in 1986 and 1988. Section 8(f) relief for the 1988 claim was requested before the district director, and the district director's correspondence addressed only this injury. The Director did not raise the Section 8(f)(3) defense with regard to the 1986 injury before the district director or administrative law judge and cannot raise it for the first time on appeal. Since the 1986 injury is the only injury resulting in permanent disability, the Board remands for consideration of the merits of employer's request for Section 8(f) relief. *Hawthorne v. Ingalls Shipbuilding, Inc.*, 28 BRBS 73 (1994), *modified on recon.*, 29 BRBS 103 (1995).

On reconsideration, the Board clarifies its decision to state that the Director may raise the Section 8(f)(3) defense before the administrative law judge on remand, as well as contest the merits of employer's claim for Section 8(f) relief. The Director did not have the opportunity to raise the defense earlier as she was not informed of the request for Section 8(f) relief until after the administrative law judge issued his decision. *Hawthorne v. Ingalls Shipbuilding, Inc.,* 29 BRBS 103 (1995), *modifying on recon.* 28 BRBS 73 (1994).

The Board holds that the administrative law judge erred in raising the Section 8(f)(3) bar based on the district director's statement, in her letter referring the case for a hearing, that employer did not file a Section 8(f) application. The Board holds that as the plain language of 20 C.F.R. §702.321(b)(3) requires that the "Director" raise and plead the absolute defense, and elsewhere requires action by the district director, the reference to the Director cannot also refer to the district director. Moreover, a referral letter is ministerial in nature, and is insufficient to "plead" the Section 8(f)(3) bar. As the Director was on notice in this case that Section 8(f) was at issue and did not raise and plead the bar at the hearing, the Board remands the case for consideration of the merits of Section 8(f). *Abbey v. Navy Exchange*, 30 BRBS 139 (1996).

The Board held that the administrative law judge erroneously determined that the Section 8(f)(3) bar did not apply when the district director informed employer that a Section 8(f) application was due by a certain date and employer missed the deadline. The letter from the district director implied that the case was under consideration, and as the claim was under consideration prior to the submission of the Section 8(f) application, the administrative law judge's finding that the bar did not apply is incorrect. The Board further noted that, contrary to the administrative law judge's determination, the district director had the authority to set a date for the submission of a Section 8(f) application. 33 U.S.C. §702.321(b)(2). The case was remanded in order for the administrative law judge to determine whether employer's failure to timely submit a petition for Section 8(f) relief should be excused. In this regard, the permanency of claimant's condition is not the sole relevant criterion in determining whether employer should have anticipated the Special Fund's liability; the administrative law judge should address when employer reasonably knew the case might meet the legal requirements for obtaining Section 8(f) relief, when evidence relevant to these requirements was available, and any other facts that would have impact. In addition, any deadline set for submission of the application must have been reasonable. *Wiggins v. Newport News Shipbuilding & Dry Dock Co.*, 31 BRBS 142 (1997).

The Fourth Circuit accepted the Director's interpretation of Section 8(f)(3) and 20 C.F.R. §702.321(b)(1), (3) and held that when an employer files a Section 8(f) application before the district director on one ground (in this case a hearing loss), and then asserts before the administrative law judge an entirely new ground (a back injury), employer must demonstrate that, with respect to the new ground, it could not have reasonably anticipated the liability of the Fund before the district director considered the claim. As the administrative law judge did not make this required finding, the court remanded this case to the administrative law judge to make such a determination. *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Elliot]*, 134 F.3d 1241, 31 BRBS 215(CRT)(4th Cir. 1998).

Citing *Container Stevedoring Co.*, 935 F.2d 1544, 24 BRBS 213 (CRT)(9th Cir. 1991), the Board held that an employer is obligated to request Section 8(f) relief if it has the requisite knowledge of the permanency of claimant's condition prior to the time the

district director ”considers” the claim. In the instant case, the Board affirmed the administrative law judge’s determination that employer’s application for Section 8(f) relief was timely since it was filed prior to the time that the permanency of claimant’s condition became an issue before the district director. The Board held the administrative law judge’s use of the date of the informal conference, December 6, 1995, as the pivotal date for filing of the Section 8(f) application, is rational and in accordance with law, as it was at this point in time that the district director first undertook the consideration of claimant’s claim. The Board found unpersuasive the fact that the claim had been initially filed in 1990, since claimant had taken no action, nor raised the issue of permanency with regard to his claim until May 1995. *Rice v. Newport News Shipbuilding & Dry Dock Co.,* 32 BRBS 102 (1998).

The Board held that contrary to the administrative law judge’s determination, employer’s application for Section 8(f) relief, if comprised solely of employer’s November 29, 1995, letter and medical report of Dr. Shaw, is not fully documented as it does not specify “the reasons for believing that the claimant’s permanent disability after the injury would be less were it not for the pre-existing permanent partial disability,“ 20 C.F.R. §702.321(a)(1)(ii). The Board however held that the administrative law judge’s error is harmless as he rationally concluded that employer’s request for an extension of time to supplement its application was improperly denied by the district director. The Board therefore affirmed the finding that employer could submit additional evidence in support of its request for Section 8(f) relief at the formal hearing. *Rice v. Newport News Shipbuilding & Dry Dock Co.,* 32 BRBS 102 (1998).

The Board holds that contrary to the administrative law judge’s determination, employer’s application for Section 8(f) relief satisfies Section 8(f)(3), as it contains the grounds for employer’s assertion of entitlement to Section 8(f) relief and the information required by Section 702.321(a)(1). Thus, employer’s application is complete, fully documented and sufficient to preclude application of the Section 8(f)(3) bar. The test for whether employer has submitted a sufficient application under Section 702.321(a)(1) is not whether it has affirmatively proven its entitlement to Section 8(f) relief but whether it has provided the required documentation of the basis for its claim to such relief. *Callnan v. Morale, Welfare & Recreation, Dept. of the Navy*, 32 BRBS 246 (1998).

In light of the Fourth Circuit’s decision in *Elliot*, 134 F.3d 1241, 31 BRBS 215(CRT) (4th Cir. 1998), the Board, on reconsideration, modifies its decision to place the burden on employer, rather than Director, to show for purposes of Section 8(f)(3), that it could not have reasonably anticipated the liability of the Special Fund as to claimant’s pre-existing mental condition while the claim was pending before the district director. The case is remanded to the administrative law judge to address the evidence relevant to this issue. *Farrell v. Norfolk Shipbuilding & Dry Dock Corp.*, 32 BRBS 283 (1998), *modifying on recon.* 32 BRBS 118 (1998).

The Fifth Circuit holds that employer is not required to present an application for Special Fund relief before referral of the claim to OALJ if the existence of the relevant medical evidence is unknown until after the transfer and therefore it could not have reasonably anticipated the Fund's liability earlier. Nor is employer obliged to engage in discovery in order to develop its Section 8(f) case while the matter is pending before the district director, as employer need only request Section 8(f) relief when it knows it has a claim. "Reasonable anticipation" is a factual determination to be addressed by the administrative law judge. *Director, OWCP v. Vessel Repair, Inc. [Vina]*, 168 F.3d 190, 33 BRBS 65(CRT) (5th Cir. 1999).

The Board reversed the administrative law judge's finding that Section 8(f)(3) does not bar the claim for Section 8(f) relief. The district director had scheduled an informal conference on employer's motion for modification and employer was obligated to raise Section 8(f) at that time as the permanency of claimant's disability was at issue. The statute does not provide an exception, applicable in modification cases, to the rule that a claim for Section 8(f) relief must be raised before the district director; by its specific terms Section 8(f)(3) applies to all claims for Sections 8(f) relief. The fact that the informal conference was not held at employer's request, does not mean that the district director did not "consider" the claim, *see Container Stevedoring,* 935 F.2d 1544, 24 BRBS 213(CRT) (9th Cir. 1991). *Firth v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 75 (1999), *aff'd,* 363 F.3d 311, 38 BRBS 1(CRT) (4th Cir. 2004).

Employer conceded it did not comply with Section 8(f)(3), but contended that the purpose of that section was met when it raised the issue of its entitlement to Section 8(f) relief before the administrative law judge. The Fourth Circuit held that the requirements of Section 8(f)(3) are unambiguous, and they declined to depart from the statute; employer cannot obtain Section 8(f) relief if it does not comply with mandatory procedural requirements of Section 8(f)(3). The court further rejected employer's contention the absolute bar is not applicable because the district director did not set a deadline for filing an application. Employer must first request Section 8(f) relief before the district director sets an application deadline. The court also rejected employer's contention that the district director did not "consider" the case; employer requested that an informal conference not be held. Thus, it cannot later rely on the absence of the conference in the manner suggested. *Newport News Shipbuilding & Dry Dock Co. v. Firth*, 363 F.3d 311, 38 BRBS 1(CRT) (4th Cir. 2004), *aff'g* 33 BRBS 75 (1999).

The Fourth Circuit held that an employer cannot unqualifiedly amend a Section 8(f) claim after the district director originally considered it, as this would prevent the Director

from adequately defending the Special Fund. In the instant case, the court vacated the Board's affirmance of the administrative law judge's denial of theSection 8(f)(3) bar and remanded the case to the administrative law judge to determine whether employer could have reasonably anticipated the late-asserted ground for Section 8(f) relief at the time the application was filed with the district director. *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.* (*Dillard)*, 230 F.3d 126, 34 BRBS 100(CRT) (4th Cir. 2000).

Although Section 8(f)(3) is not applicable as it was not raised by the Director, the administrative law judge did not err in finding employer's request for Section 8(f) relief untimely. Pre-1984 Amendment law regarding the timely raising of Section 8(f) relief still applies. Employer did not raise its entitlement to Section 8(f) relief for the first time until it moved for modification, and the administrative law judge rationally determined that employer did not raise any special circumstances that would permit it to raise the issue at that time. *Ceres Marines Terminal v. Hinton*, 243 F.3d 222, 35 BRBS 7(CRT) (5th Cir. 2001).

Where claimant properly withdrew his Longshore claim to exclusively pursue a claim under the state workers' compensation statute, the Board held that employer is entitled to a hearing on its request for Section 8(f) relief regardless of whether claimant has withdrawn his claim for benefits under the Act. The Board noted, however, that a finding that employer is entitled to Section 8(f) relief will not affect employer's obligations under the state statute. The Board deferred to the Director's position that, notwithstanding that any liability of the Special Fund would be completely offset pursuant to Section 3(e) by the state benefits paid by employer, a finding of Special Fund liability would benefit employer with respect to the calculation of employer's assessment under Section 44. *Langley v. Kellers' Peoria Harbor Fleeting*, 27 BRBS 140 (1993) (Brown, J., concurring and dissenting).

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The Effect of Settlements and Stipulations

The Board reverses administrative law judge's award of Section 8(f) relief where the only evidence on contribution in the record was the parties' stipulation of facts, which was not binding on the Special Fund absent the participation of the Director. McDougall v. E.P. Paup Co., 21 BRBS 204 (1988), aff'd in pert. part and modified on other grounds sub nom. E. P. Paup Co. v. Director, OWCP, 999 F.2d 1341, 27 BRBS 41 (CRT)(9th Cir. 1993).

The Ninth Circuit affirmed the Board's determination denying Section 8(f) relief. The court noted that a stipulation made between employer and claimant relevant to the contribution element did not constitute substantial evidence sufficient to support an award of Section 8(f) relief where the Director did not participate. The court further noted that the medical reports relied upon by employer were insufficient to establish that claimant's injury alone did not cause claimant's permanent total disability. Because there was no evidence of record pertaining to the contribution element other than the stipulations, the court affirmed the Board's denial of Section 8(f) relief. *E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41 (CRT)(9th Cir. 1993), *aff'g in pert. part and modifying on other grounds McDougall v. E.P. Paup Co.*, 21 BRBS 204 (1988).

The Board affirmed the administrative law judge's approval of a settlement agreement between employer and claimant which provided that the Special Fund is liable for claimant's pre-existing hearing loss, even though the Director did not directly participate in the settlement. In the instant case, the district director had previously approved employer's Section 8(f) application, noting that based on a pre-existing 11.3 percent monaural hearing loss, the Special Fund is liable for 5.9 weeks of compensation; thus, the settlement did not bind the Special Fund to anything to which the Director had not previously agreed. The Board held that since employer's entitlement to Section 8(f) relief was established prior to the settlement, the Director constructively participated in the settlement process. *Dickinson v. Alabama Dry Dock & Shipbuilding Corp.*, 28 BRBS 84 (1993).

The Board distinguished the facts of two consolidated hearing loss cases, where the district director either deferred adjudication of employer's request for Section 8(f) relief, or approved employer's request but did not indicate the extent of the Fund's liability, from *Dickinson*, 28 BRBS 84 (1993), and held that the Director did not constructively participate in either settlement. Because the Director did not participate, either constructively or explicitly, the administrative law judge erred in approving the settlements which apportion liability to the Fund. The settlements are vacated and the cases are remanded for decisions on the merits. *Byrd v. Alabama Dry Dock & Shipbuilding Corp.*, 27 BRBS 253 (1993).

In a retiree hearing loss case where the administrative law judge accepted the parties' stipulations and approved a Section 8(i) settlement, the Board found merit in the Director's argument that the average weekly wage stipulation (NAWW at time of audiogram instead of average weekly wage at time of last exposure) would bind the Special Fund to excessive liability in Section 8(f) applies. In light of the Supreme Court's decision in *Bath Iron Works* and the Board's decision in *Moore*, 27 BRBS 76 (1993), the Board remanded the case for the administrative law judge to determine the appropriate average weekly wage. *Byrd v. Alabama Dry Dock & Shipbuilding Corp.,* 27 BRBS 253 (1993).

Where claimant and employer entered into a settlement agreement and one of the provisions sought to reserve employer's right to seek relief from the Special Fund, the Board held that Section 8(i)(4) automatically barred employer's right to seek Section 8(f) relief, as the provision was void as a matter of law. Because the parties entered into the agreement without the participation of the Director and without first obtaining a determination of whether the employer would be entitled to Section 8(f) relief, the Board held that employer was not entitled to relief from the Special Fund. *Strike v. S. J. Groves & Sons*, 31 BRBS 183 (1997), *aff'd sub nom. S. J. Groves & Sons v. Director, OWCP,* 166 F.3d 1206 (3d Cir. 1998)(table).

Rejecting employer's argument that the Board's holding in *Strike,* 31 BRBS 183 (1997), *i.e.,* that the language of Section 8(i)(4) protects the Special Fund from liability after an employer enters into a Section 8(i) settlement with a claimant, applies only where Section 8(f) is requested after the settlement is approved, the Board affirmed the administrative law judge's determination that employer's claim for Section 8(f) relief is prohibited by Section 8(i)(4). The Board held that a settlement is entered into when it is executed by the parties, not when it is administratively approved. Moreover, the simultaneous submission of the settlement agreement and the stipulations and exhibits in support of employer's claim for Section 8(f) relief foreclosed the administrative law

judge's consideration of the request for Section 8(f) relief, since the speedy resolution mechanism of Section 8(i)(1) prevents any delay in litigating issues necessary for a Section 8(f) determination. Consequently, once the settlement is approved, claimant's entitlement is fixed and employer's liability is discharged; Section 8(i)(4) prevents the transfer of liability under the settlement to the Special Fund, and as employer's liability is discharged, the Fund's derivative liability is also discharged. *Cochran v. Matson Terminals, Inc*., 33 BRBS 187 (1999).

The Ninth Circuit rejected the Director's contention that the administrative law judge and Board should not have awarded Section 8(f) relief based on a stipulation in which the Director did not concur, since the stipulations, that the employee could not return to his usual employment and setting the employee's residual wage-earning capacity and employer's liability for attorney's fees, did not purport to establish the Special Fund's liability. The Director participated in the hearing, but did not object to the matters on which the parties stipulated; thus, his right to object was waived. The Ninth Circuit further observed that the administrative law judge heard evidence and independently arrived at the finding, not based on the stipulation, that the employer was entitled to Section 8(f) relief because of the employee's previous broken back. *Director, OWCP v. Coos Head Lumber & Plywood Co*., 194 F.3d 1032, 33 BRBS 131(CRT)(9th Cir. 1998).

Noting that the facts of the instant case are similar to those presented in *Coos Head Lumber & Plywood Co.*, 194 F.3d 1032, 33 BRBS 131(CRT)(9th Cir. 1998), and are distinguishable from those presented in *Strike,* 31 BRBS 183 (1997), and *Cochran,* 33 BRBS 187 (1999), the Board affirmed the administrative law judge's finding that employer is entitled to Section 8(f) relief and that its entitlement is not precluded by Section 8(i)(4). The Board noted that like *Coos Head Lumber*, the private parties' settlement agreement did not seek to subject the Special Fund to liability and that while it did affect the liability of the Special Fund in that it set out the extent of permanent disability and the level of claimant's loss of wage-earning capacity, the Director had already conceded those issues as well as employer's entitlement to Section 8(f) relief "upon agreement of the parties as to the extent of permanent disability and/or the level of claimant's loss in wage-earning capacity." Additionally, the Board observed that the Director's concession regarding Section 8(f) relief for liability based on the agreement of the parties as to claimant's loss in wage-earning capacity is the distinguishing feature from *Strike* and *Cochran*. *Nelson v. Stevedoring Services of America*, 34 BRBS 91 (2000), *aff'd on recon.,* 35 BRBS 55 (2001).

On reconsideration, the Board clarified its earlier decision, holding that the administrative law judge's decision reflects an approval of a Section 8(i) settlement agreement which is not subject to modification. The Board however also holds employer's claim for Section 8(f) relief is not barred by Section 8(i)(4). The Board relied on the fact that the Director explicitly, in writing, conceded employer's entitlement to Section 8(f) relief for any permanent partial disability in his pre-hearing statement, whether after a hearing or upon agreement of the parties. The Director thus gave his

specific approval to the parties' resolving this claim by agreement and nothing in the Director's document restricted this approval to agreements based on stipulations as opposed to ones contained in an approved Section 8(i) settlement. The Director provided this approval *prior* to the time that the parties entered into their agreement and sought and received approval by the administrative law judge. Moreover, the Board noted that the purpose of Section 8(i)(4) was satisfied as the Director was provided with, and in fact participated in the case, prior to the time the settlement was entered into. *Nelson v. Stevedoring Services of America*, 35 BRBS 55 (2001), *aff'g on recon.* 34 BRBS 91 (2000).

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As the Director stipulated that the Special Fund is liable for permanent total disability benefits commencing on a certain date, the Board modified the administrative law judge's award of benefits to reflect employer's entitlement to Section 8(f) relief. *Weber v. S.C. Loveland Co.*, 35 BRBS 75 (2001), *aff'd on recon.,* 35 BRBS 190 (2002).

Miscellaneous

The Board's decision in Honeycutt, 17 BRBS 142 (1985), in which it held that where permanent partial disability is followed by permanent total disability and Section 8(f) is applicable to both periods of disability, employer is liable for only one period of 104 weeks, is not applicable where claimant's permanent total disability award is for a totally new injury which is unrelated to his permanent partial disability. Cooper v. Newport News Shipbuilding & Dry Dock Co., 18 BRBS 284 (1986).

The Board affirms administrative law judge's determination that under Graziano, 14 BRBS 950 (1982), employer's liability is limited by Section 8(f) to one period of 104 weeks where decedent's death is found to be unrelated to his employment but death benefits are awarded based on decedent's permanent total disability at time of death. To hold otherwise would nullify Section 8(f) for that class of cases. Board rejects Director's argument that Section 8(f) was intended to limit employer's liability to no more than 104 weeks on each type of claim (death and disability). Bingham v. General Dynamics Corp., 20 BRBS 198 (1988).

The Board held that the administrative law judge erred in denying Section 8(f) relief with regard to the payment of death benefits where Section 8(f) relief had been awarded with regard to the payment of disability compensation. The Board held that Section 8(f) applies where the employee's death is unrelated to his employment, but where death benefits are based on decedent's permanent total disability due in part to a work-related injury at the time of death, and modified the award of Section 8(f) relief to one period of 104 weeks. Hickman v. Universal Maritime Service Corp., 22 BRBS 212 (1989).

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It is consistent with the Act to assess employer for only one 104 week period of liability, pursuant to Section 8(f), for all disabilities arising out of the same injury. This rationale is equally applicable to awards for permanent partial disability and death benefits arising from the same injury; it is immaterial that the death benefits were paid before the permanent partial disability benefits. This rationale had previously been applied to awards for permanent partial followed by permanent total, and to awards for permanent total followed by death benefits. Henry v. George Hyman Construction Co., 21 BRBS 329 (1988).

Where employer claims Section 8(f) relief and the case involves two separate claims, in this case a Section 8(c)(23) claim and Section 9 death benefits claim, employer's entitlement to Section 8(f) relief must be separately evaluated in regard to each claim. If Section 8(f) applies to both claims, employer is only liable for one period of 104 weeks. Adams v. Newport News Shipbuilding & Dry Dock Co., 22 BRBS 78 (1989).

The Fourth Circuit affirms the Board's agreement with the Director's interpretation of Section 8(f) which allows for a new 104 week liability period to be assessed against employer, under certain circumstances, for successive work-related injuries. In the instant case, claimant suffered a permanent partial disability to his back and employer was awarded Section 8(f) relief. Subsequently, claimant developed carpal tunnel syndrome which combined with his prior back injury to produce total disability. As the subsequent injury was new and distinct from the earlier injury, employer was held liable for a second 104 week period of liability under Section 8(f). Newport News Shipbuilding & Dry Dock Co. v. Howard, 904 F.2d 206, 23 BRBS 131 (CRT)(4th Cir. 1990).

Because claimant sought death benefits and compensation for decedent's permanent partial disability, employer must raise and show entitlement to Section 8(f) relief for each claim separately. Where both types of benefits have been awarded and where 8(f) applies to each, an employer is liable for only one 104-week period of payments if the disability and death arose from the same injury. If the employee sustained successive injuries, employer may be liable for one 104-week period on both the disability and death claims. Because the administrative law judge in this case did not separately analyze employer's entitlement to 8(f) with regard to each claim, and because he did not discuss which conditions constituted a pre-existing permanent partial disability, the Board remanded the case for further consideration. *Fineman v. Newport News Shipbuilding & Dry Dock Co.,* 27 BRBS 104 (1993). *See also Stone v. Newport News Shipbuilding & Dry Dock Co.*, 29 BRBS 44 (1995); *Perry v. Bath Iron Works Corp.,* 29 BRBS 57 (1995).

Because Section 8(f)(1) delineates an employer's potentially differing periods of liability for scheduled and unscheduled partial awards, and because that difference affects the Special Fund's secondary liability, the Board agreed with the Director and held that where a claimant is awarded benefits under the schedule as well as under Section 8(c)(21), an employer must seek and prove entitlement to Section 8(f) relief on each award separately. *Padilla v. San Pedro Boat Works*, 34 BRBS 49 (2000).

The Special Fund will not be held liable under Section 8(f) for medical expenses. Stone v. Newport News Shipbuilding & Dry Dock Co., 20 BRBS 1 (1987).

The Board agrees with the Director that administrative law judge erred in assessing funeral expenses against the Special Fund pursuant to Section 8(f) on the rationale that such expenses are included within definition of compensation found in Section 2(12). Relying on Kahny, 15 BRBS 212 (1982), the Board noted that the word "compensation" may have different meanings under different sections of the Act depending on the purpose of the section in which it is being used. Board indicates that Section 8(f) was only intended to limit employer's liability for periodic payments of compensation and thus that funeral expenses are not included within the class of compensation for which the Special Fund could be liable under Section 8(f). Bingham v. General Dynamics Corp., 20 BRBS 198 (1988).

Funeral expenses cannot be assessed against the Special Fund, as they are not considered to be "compensation." *Fineman v. Newport News Shipbuilding & Dry Dock Co.,* 27 BRBS 104 (1993).

The Board vacates administrative law judge's award of Section 8(f) relief under Porras on rationale that Section 8(f) relief is not proper where claimant is awarded a de minimis award. Board instructs administrative law judge that if on remand he concludes that claimant sustained more than a nominal loss in wage-earning capacity, he should reconsider employer's entitlement to Section 8(f) relief. Peele v. Newport News Shipbuilding & Dry Dock Co., 20 BRBS 133 (1987).

Claimant's award for permanent partial disability after the first 2.4 years is a *de minimis* award. The Director does not contest employer's entitlement to Section 8(f) relief for the first period of permanent partial disability, but maintains it is inapplicable to the *de minimis* portion. The Board rejects this contention, holding employer liable for only one period of 104 weeks for all permanent disabilities arising out of the same injury consistent with *Huneycutt*, 17 BRBS 142 (1985) and its progeny. The Board notes that the policy considerations behind the holding that employer cannot receive Section 8(f) relief in a *de minimis* case is absent here, as employer is liable for the greater disability. *Murphy v. Pro-Football, Inc.*, 24 BRBS 187 (1991), *aff'd on recon.*, 25 BRBS 114 (1991), *rev'd mem. on other grounds*, No. 91-1601 (D.C. Cir. Dec. 18, 1992).

Applying the underlying concerns addressed in *Porras*, 17 BRBS 222 (1985), *aff'd*, 792 F.2d 1489, 19 BRBS 3(CRT) (9th Cir. 1986), the Board affirmed the administrative law judge's determination that employer cannot seek Section 8(f) relief at the present time, since the degree of claimant's disability is so small in fact ($3.78 per week) that employer would be legally unable to establish that claimant's disability is not due solely to the work injury, and is, in fact, "materially and substantially greater" than that caused by the last injury alone. Additionally, the Board noted that the underlying policy of Section 8(f) would not be served in this case if employer were granted Section 8(f) relief, since it would enable employer to avoid liability for any substantial disability which may subsequently arise as a result of the instant work-related injury. *Stallings v. Newport News Shipbuilding & Dry Dock Co*., 33 BRBS 193 (1999), *vacated in pert. part,* 250 F.3d 868, 35 BRBS 51(CRT) (4th Cir. 2001).

In case in which claimant was awarded $3.78 per week for his loss of wage-earning capacity, the Fourth Circuit held that despite the fact that claimant's award was small, it was not nominal as it reflects claimant's actual, current loss in wage-earning capacity. The court vacates the Board's holding that employer is precluded from seeking Section 8(f) relief on such a small award, as it holds that it is legally and factually possible for employer to establish that claimant's current disability is materially and substantially greater due to his pre-existing disabilities, despite the small size of the monetary award. The court states that the Director's policy concerns, that the Special Fund might become liable for a greater loss in wage-earning capacity in the future if Section 8(f) relief is awarded now, is unfounded as there is no finding in this case that claimant's disability will likely increase in the future. The case is remanded for the merits of Section 8(f). *Newport News Shipbuilding & Dry Dock Co. v. Stallings*, 250 F.3d 868, 35 BRBS 51(CRT)(4th Cir. 2001), *vacating in pert. part* 33 BRBS 193 (1999).

Pursuant to the credit doctrine, where a claimant is compensated by employer for a scheduled injury, and a second injury results in an increased scheduled disability, employer is entitled to a credit for the dollar amount of the prior payment against its liability for 104 week pursuant to Section 8(f). In its Decision on Reconsideration, the Board reaffirms application of both the credit doctrine and Section 8(f) relief in the same case. Employer is liable for payment of 104 weeks of compensation with a credit for compensation previously paid relative to the pre-existing disability. Brown v. Bethlehem Steel Corp., 19 BRBS 200, aff'd on recon., 20 BRBS 26 (1987), aff'd in part and rev'd in part sub nom. Director, OWCP v. Bethlehem Steel Corp., 868 F.2d 759, 22 BRBS 47 (CRT)(5th Cir. 1989).

The Fifth Circuit reverses Board, holding that when a second scheduled injury increases a claimant's pre-existing permanent partial disability and where this second injury alone results in over 104 weeks of compensation, then whenever a credit for previous compensation paid as a result of the initial injury is available to offset the present amount due claimant, that credit shall first reduce the total award before there is any allocation of liability under Section 8(f). This reduction in the total award due as a result of the second injury will effectively apply the credit to the Special Fund's liability first, with any credit remaining to be applied employer's liability. The court affirmed the Board, further holding that the amount of the credit to be allowed against the total award shall be the actual dollar amount of payment that was previously made to claimant as a result of the initial injury. Director, OWCP v. Bethlehem Steel Corp., 868 F.2d 759, 22 BRBS 47 (CRT)(5th Cir. 1989), aff'g in part and rev'g in part Brown v. Bethlehem Steel Corp., 19 BRBS 200 and 20 BRBS 26 (1987).

The Board holds that employer is entitled to a credit for its voluntary payments of benefits and to reimbursement from the Special Fund for its voluntary payments which were in excess of its liability due to the operation of Section 8(f). Krotsis v. General Dynamics Corp., 22 BRBS 128 (1989), aff'd sub nom. Director, OWCP v. General Dynamics Corp., 900 F.2d 506, 23 BRBS 40 (CRT) (2d Cir. 1990).

The Second Circuit affirmed the Board's holding that the Special Fund had to reimburse employer for its voluntary advance payment of compensation which was overly generous due to the operation of Section 8(f). Employer, not the Special Fund, gets the credit under Section 14(j) for the advance payment. The court distinguishes Brown, 868 F.2d 759, 22 BRBS 47 (CRT) (5th Cir. 1991), on the grounds that in Brown, unlike this case, there were no pre-employment disabilities, and Bethlehem's payments were entirely for work-related injuries. Under these circumstances, granting employer a credit would result in an underpayment of employer's liability. Here, claimant has a pre-employment hearing loss, which employer had compensated in addition to compensating claimant for his entire hearing loss due to his employment. Thus, employer gets credit for its overpayment and the Fund must reimburse that portion of its liability paid by employer. Director, OWCP v. General Dynamics Corp., 900 F.2d 506, 23 BRBS 40 (CRT)(2d Cir. 1990), aff'g Krotsis v. General Dynamics Corp., 22 BRBS 128 (1989).

The Board holds that employer is entitled to reimbursement from the Special Fund for overpayments of compensation due to the operation of Section 8(f). In this case, allowing employer a credit does not absolve employer of its liability for the full extent of claimant's hearing loss attributable to his employment with employer, as the Fund's liability is fixed at the extent of claimant's pre-employment hearing loss under amended Section 8(f), regardless of claimant's overall hearing impairment rating. Balzer v. General Dynamics Corp., 22 BRBS 447 (1989), aff'd on recon. en banc, 23 BRBS 241 (1990) (Brown, J., dissenting).

The Second Circuit follows *Brown*, 868 F.2d 759, 22 BRBS 47 (CRT)(5th Cir. 1991), on the facts of this case and holds that where an employee who has previously received compensation for a hearing loss which was entirely work-related brings a second injury claim alleging that his hearing loss has worsened, the Special Fund, and not the employer, is to receive the benefit of the credit. In so concluding, the court distinguished *Krotsis*, wherein the claimant had a pre-existing non-work related hearing loss and employer was entitled to the credit, noting that as claimants Blanchette and Wilcox did not exhibit any pre-employment hearing loss, awarding the credit to the Special Fund rather than to the employer would not unfairly result in the employer's being held liable for a disability which was not work-related. The court further determined that allowing the Special Fund a credit under such circumstances was consistent with the express language of Section 8(f)(1) of the Act which indicates that the employer is to compensate the disabled employee for the entire second injury and with Congressional intent to control the unrestrained growth of the Special Fund's obligations by ensuring that employer pays the full stake specified in Section 8(f). *Blanchette v. Director, OWCP*, 998 F.2d 109, 27 BRBS 58 (CRT) (2d Cir. 1993).

In a hearing loss case in which the claimant had filed three separate claims, the Board remand for consideration of whether the second employer was entitled to Section 8(f) relief. If, on remand, the administrative law judge found that the second employer was entitled to Section 8(f) relief, the Board held that the credit for the previous hearing loss settlement would properly be applied to reduce the liability of the Special Fund pursuant to *Blanchette*, 998 F.2d 109, 27 BRBS 58 (CRT) (2d Cir. 1993), and *Brown*, 868 F.2d 759, 22 BRBS 47(CRT) (5th Cir. 1989). With regard to the administrative law judge's finding that the third employer is entitled to relief pursuant to Section 8(f), the Special Fund would be liable for the additional compensation attributable to the pre-existing impairments based on the higher average weekly wage in effect at the time of the third injury. *Giacalone v. Matson Terminals, Inc*., 37 BRBS 87 (2003).

The Board agreed with the administrative law judge's conclusion that employer is not entitled to Section 8(f) relief from its liability for claimant's award of benefits under Section 8(c)(2), although it so held on grounds others than those espoused by the administrative law judge. Specifically, because of the rule providing that the Special Fund is to obtain the benefit of the credit in those cases involving the credit doctrine and Section 8(f), *Brown*, 868 F.2d 759, 22 BRBS 47(CRT) (5th Cir. 1989), thereby requiring an employer to pay for at least the full extent of the second injury, the Board held that even if the elements of Section 8(f) had been established, employer could not benefit from Section 8(f) in this case. The Act requires an employer to pay the greater of 104 weeks of benefits or the number of weeks attributable to the second injury. Whether this amount is the number of weeks due under the schedule or to an adjustment made by the administrative law judge due to a concurrent award situation, the employer must still pay all of the benefits attributable to the second injury. Thus, in this instance, employer is liable for scheduled benefits for the full number of weeks exceeding those needed to account for claimant's pre-existing disability, for which claimant previously received benefits and for which the Special Fund takes the credit. As the administrative law judge took the previous settlement amount into account in making his calculations and prior to making adjustments for the concurrent awards, employer is liable for the full amount awarded. *Padilla v. San Pedro Boat Works*, 34 BRBS 49 (2000).

Where claimant sustained injuries to both knees, employer is liable for two separate 104-week periods under Section 8(f), as these were two distinct injuries, resulting in distinct compensable disabilities, notwithstanding that the injuries arose from the same working conditions. The language of Section 8(c)(2) lends support to this interpretation, as it provides compensation for "leg lost" in the singular, and Section 8(c)(22) provides for award of compensation for *each* member injured, with several specific exceptions not applicable here. *Berg v. Matson Terminals, Inc.,* 34 BRBS 140 (2000), *aff'd*, 279 F.3d 694, 35 BRBS 152(CRT) (9th Cir. 2002).

The Board's decision in *Huneycutt,*17 BRBS 142 (1985), and similar line of cases, in which it held that where permanent partial disability is followed by permanent total disability and Section 8(f) is applicable to both periods of disability, employer is liable for only one period of 104 weeks, is not applicable in this case. In the *Huneycutt* line of cases, the two disabilities are the result of the same injury, whereas in this case, the two permanent partial disability awards are for two distinct disabilities, resulting from unrelated injuries to each of claimant's knees. This case is similar to *Howard*, 904 F.2d 206, 23 BRBS 131(CRT) (4th Cir. 1990), and *Cooper*, 18 BRBS 284 (1986), holding employer liable for two periods of 104 weeks for disabilities due to unrelated injuries. *Berg v. Matson Terminals, Inc.,* 34 BRBS 140 (2000), *aff'd,* 279 F.3d 694, 35 BRBS 152(CRT) (9th Cir. 2002).

The Ninth Circuit affirmed the Board's affirmance of the administrative law judge's Section 8(f) award after a period of 104 weeks for each of claimant's knee injuries,

because claimant suffered discrete injuries to both knees, albeit in the same incident. The court reasoned that employer was liable for two 104-week periods instead of one because claimant's working conditions, even if arising from the same accident, caused two injuries that are separately compensable under the Act. *Matson Terminals, Inc. v. Berg*, 279 F.3d 694, 35 BRBS 152(CRT) (9th Cir. 2002), *aff'g* 34 BRBS 140 (2000).

The Board rejected employer's argument that being held liable for two 104-week periods under Section 8(f) provides a disincentive to hire and retain handicapped employees, thereby undermining the policy considerations behind Section 8(f), as the Fourth Circuit, addressing the same argument in *Howard*, 904 F.2d 206, 23 BRBS 131(CRT) (4th Cir. 1990), stated that account must also be taken of the parallel congressional concern with workplace safety that is reflected in the overall statutory scheme. *Berg v. Matson Terminals, Inc.,* 34 BRBS 140 (2000), *aff'd,* 279 F.3d 694, 35 BRBS 152(CRT) (9th Cir. 2002).

In the case of a scheduled injury, employer is liable for compensation for the greater of 104 weeks or the number of weeks in the schedule attributable to the subsequent injury. The administrative law judge here reasonably determined, based on Dr. London's report, that since as a result of a 1990 accident claimant had a 16 percent impairment to each leg, and the parties stipulated to a 50 percent impairment to each leg up until and including June 14, 1996, claimant sustained a 34 percent impairment to each knee as a result of claimant's employment. Employer was held liable for 104 weeks' compensation for each knee as this is greater than 34% of 288, 33 U.S.C. §908(c)(2). *Berg v. Matson Terminals, Inc.,* 34 BRBS 140 (2000), *aff'd,* 279 F.3d 694, 35 BRBS 152(CRT) (9th Cir. 2002).

The Ninth Circuit affirmed the finding that claimant's pre-existing disability was 16 percent based on the opinion of employer's physician and thus a 34 percent impairment to both knees was attributable to claimant's work injury where the parties stipulated that the result of claimant's work injury was a 50 percent impairment to each knee. *Matson Terminals, Inc. v. Berg*, 279 F.3d 694, 35 BRBS 152(CRT) (9th Cir. 2002), *aff'g* 34 BRBS 140 (2000).

Where the Board modified the administrative law judge's date of permanency to an earlier date, the Special Fund should have assumed liability sooner. Employer is entitled to reimbursement of overpaid compensation from the Special Fund in a lump sum with interest. To the extent claimant received Section 10(f) adjustments from employer during periods of temporary total disability, he was overpaid. As Section 8(f) applies, Special Fund may withhold an increment of claimant's periodic payments, and repay employer for its Section 10(f) overpayments in periodic installments. *Phillips v. Marine Concrete Structures, Inc.,* 21 BRBS 233 (1988), *aff'd,* 877 F.2d 1231, 22 BRBS 83 (CRT)(5th Cir. 1989), *vacated in part on other grounds,* 895 F.2d 1033, 23 BRBS 36 (CRT)(5th Cir. 1990)(*en banc*).

The Board held that in light of its determination that employer was solely liable for the payment of claimant's benefits, employer must reimburse the state for the money the

state paid to claimant on employer's behalf. In addition, because the Board reversed the administrative law judge's award of Section 8(f) relief, the Board determined that employer must also reimburse the state for the payments made by the state on behalf of the Special Fund. *McDougall v. E.P. Paup Co.*, 21 BRBS 204 (1988), *aff'd and modified sub nom. E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41 (CRT)(9th Cir. 1993).

The Ninth Circuit modifies the Board's decision to hold that employer must pay claimant an amount equal to the state payments and claimant must then repay the state. *E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41 (CRT)(9th Cir. 1993), *aff'g and modifying McDougall v. E.P. Paup Co.*, 21 BRBS 204 (1988).

The Board rejects the Director's contention that Section 8(f) should not apply in cases where the employer administers audiograms to claimant and allegedly does not inform him of the results or file an injury report with the district director. In this case there is no evidence that the results were concealed, and under Section 30(a) as amended in 1984, employer has no duty to report "no time lost" injuries. *Skelton v. Bath Iron Works Corp.*, 27 BRBS 28 (1993).

The Board remands the case to the administrative law judge for the entry of an award (or denial) of benefits based on the agreement of the parties or after a hearing on the merits. The administrative law judge was procedurally barred from considering employer's entitlement to Section 8(f) relief where no award of benefit was entered. Thus, it is unknown if there is to be an award of permanent benefits of more than 104 weeks, if the Director agreed to any stipulations of the private parties, or if employer was seeking Section 8(f) relief after it agreed to a Section 8(i) settlement, in violation of Section 8(i)(4). *Gupton v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 94 (1999).

Section 8(f)(2)(A) provides that the Special Fund "shall not" be responsible for benefits pursuant to Section 8(f) if the employer fails to comply with Section 32(a), which requires the employer to have insurance. Due to the mandatory nature of the statutory language, the difference in the regulations implementing 8(f)(2)(A) and 8(f)(3), and based on an analogy with raising Section 14(e) issues, the Board holds that Section 8(f)(2)(A) is an issue which may be raised at any time. The Board further holds that the relevant time for determining if employer is insured is the time the injury occurred, as this interpretation is supported by the Section 44 assessment formula. As it was not contested that employer did not have insurance at the time of claimant's injury, the Board reversed the administrative law judge's finding that Section 8(f) relief is not barred in this case. *Lewis v. Sunnen Crane Service, Inc.*, 34 BRBS 57 (2000).

The Board rejected the Director's motion to reconsider the award of Section 8(f) relief on the ground that employer failed to secure payment of compensation under Section 32. The Board distinguished *Lewis*, 34 BRBS 57 (2000), stating that employer's effort herein to obtain the necessary coverage was a far cry from the *Lewis* employer's attempt to circumvent the Act. Thus, although, due to pronouncements in the law, employer's insurance ultimately contained a gap in policies which omitted coverage for

claimant's injury at the Port of Kingston, such error does not mandate the conclusion that employer failed to secure payment of compensation under Section 32, and it does not bar employer from Section 8(f) relief pursuant to Section 8(f)(2). Consequently, the Board reaffirmed that the Special Fund shall assume payment for claimant's benefits after May 2, 1994. *Weber v. S.C. Loveland Co.*, 35 BRBS 190 (2002), *aff'g and modifying on recon.* 35 BRBS 75 (2001).